Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

George C. Samson, et al.

Petitioners,

v.

Apollo Resources, Inc,
doing business as Apollo Services Inc;
Jeffrey A. Reddoch and Chiquita Reddoch

Respondents,

On Petition for Writ of Certiorari
To The United States Court of
Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether The Circuit Court Erred By Refusing To Give Deference To Several Recent Department Of Labor (DOL) Published Opinion Letters Interpreting The Applicable DOL Regulation, As Well As Ignoring DOL's Fact-Finding In An Actual Investigation Of The Employer In Question, When The Court Allowed The Employer To Take Deductions From Its Employees' Guaranteed Salaries That Are Prohibited By DOL Opinion Letters And Practices?

PARTIES TO THE PROCEEDING

Petitioners

George C. Samson, III; Kevin D. Smith; Melvin K. Smith; Douglas W. Bell; Christopher A. Cornes; Norman J. Landry; John Batiste; Michael S. Briscoe; Jared Broussard; J. C. Crescionne; John Dauphin; Richard Forrestier; Forrest Green, Jr.; Chris Gremillion; Roycie Harrington; Jackie D. Hays; Joe Alan Hibbs; Ron E. Jackson; Brent C. Manuel; Robert A. Nolan; John Claude Pilette, Jr.; Mark Roberts; Charlie Soulier; Danny D. Thrower; Kevin Vincent; Brian K. Wilson; Willie A. Young, Jr.; Cornelius P. Manning; Lester D. Weaver; Crawford R. Norton. Petitioners are individuals and have no corporate affiliations.

Respondents

Apollo Resources, Inc, doing business as Apollo Services Inc; Jeffrey A. Reddoch and Chiquita Reddoch. Jeffrey A. Reddoch and Chiquita Reddoch are individuals (President and Vice President of Apollo Services, respectively). None of the Respondents have parent companies or subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

REGULATION INVOLVED IN CASE 1

STATEMENT OF THE CASE 2

A. Background Of Governing Law And Policy .. 2

B. Factual Background 4

C. Procedural History 7

REASONS FOR GRANTING THE WRIT 7

I. This Petition For Certiorari Involves Issues Larger Than The Proper Interpretation Of A Department Of Labor (DOL) Regulation, Rather It Involves Whether A Circuit Court Can Substitute Its Own Interpretation Of An Agency Regulation Over That Of The Agency Who Promulgated And Enforces The Regulation On A Daily Basis 7

A. Applicable Supreme Court Law Provides That The DOL Is Entitled To Great Deference In Interpreting Its Own Regulations And The District And Circuit Courts Erred In Substituting Their Own Inconsistent Interpretation 7

B. A Decision By This Court Is Necessary To Provide Guidance To Lower Courts As To The Deference Agencies Should Be Given In Interpreting Their Own Regulations 9

II. The Issue Presented Has Important Federal Impact And Involves An Unsettled Question of Law That Should Be Settled By This Court With This Particular Case Because The Decision Below Subverts The Fair Labor Standards Act Overtime Provisions And This Court's Decision In *Overnight Motor* .. 11

A. Since No Other Circuit Court Has Evaluated The DOL's Position On Impermissible Salary Deductions, The Fifth Circuit's Decision Provides The Only Interpretation Of The Issue For The Nation And That Decision Allows Employers To Undermine The Intended Protections Afforded To Employees By The Fair Labor Standards Act And This Court's *Overnight Motor* Decision 11

B. This Court Needs To Provide Guidance

On 29 C.F.R. § 778.114 Payplans As The Fifth Circuit's Decision, And Recent Decisions From Other Circuits, Has Systematically Eroded Employee Protections Established By This Court And Congress 12

C. The Issue Presented In This Petition Is Ripe For Decision And This Court Should Decide The Issue Now Because Similar Cases Rarely Rise To This Level 13

III. The Plaintiffs Are Only Asking This Court To Do For Blue-Collar Workers What It Did For White-Collar Workers In *Auer v. Robbins*, 519 U.S. 452 (1997), Namely To Affirm The DOL's Policies Regarding Permissible And Impermissible Deductions From Pay 14

IV. It Is Time For The Court To Revisit The Policies It Created In 1942 In *Overnight Motor*, And Address The Proper Application Of 29 C.F.R. § 778.114 Payplans 15

A. The Plaintiffs In This Case Are Representative Of The Types Of Blue-Collar, Family-Supporting Employees The FLSA Was Designed To Protect 15

B. The Fifth Circuit's Decision Gives An Unfair Advantage To Those Employers Who Fail To Abide By The

Restrictions Of 29 C.F.R. § 778.114 Over Those Employers Who Follow The Spirit of Congress As Enunciated In The FLSA And This Court In *Overnight Motor* 17

V. Conclusion 18

APPENDICES

Appendix A
Court of Appeals Opinion, 2/20/01 242 F.3d 629 (5th Cir. 2001) 1a

Appendix B
Court of Appeals Order on Petition for Rehearing, 3/20/01 (Unreported) 26a

Appendix C
District Court Judgment, 4/28/99 (Unreported) 28a

Appendix D
District Court's Additional Reasons for Judgment, 4/27/99 (Unreported) 30a

Appendix E
Dept. of Labor, Wage & Hour Opinion Letter No. 479, 5/18/66 (CCH ¶ 30,997.18) 53a

Appendix F
Dept. of Labor, Wage & Hour Opinion Letter, dated 5/26/82 (Unreported) 55a

Appendix G
Dept. of Labor, Wage & Hour Opinion Letter, 12/24/97 (1997 WL 998050) 58a

Appendix H
Dept. of Labor, Wage & Hour Opinion Letter, 3/28/96 (1996 WL 1031769) 62a

Appendix I
Dept. of Labor, Wage & Hour Opinion Letter, 2/27/95 (1995 WL 1032466) 65a

Appendix J
Dept. of Labor, Wage & Hour Opinion Letter, 4/20/99 (1999 WL 1002390) 68a

Appendix K
29 C.F.R. § 778.114 – Fixed Salary For Fluctuating Hours 72a

TABLE OF CITED AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997) ..... v, 7, 8, 9, 14, 15

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945) 16

Cash v. Conn Appliances, Inc.,
2 F.Supp.2d 884 (E.D. Tex. 1997) 11

Donovan v. Brown Equipment and Service Tools, Inc.
666 F.2d 148 (5th Cir. 1982) 2, 12, 17

Giuliani v. Yourman,
519 U.S. 1145 (1997) 11

Int'l Ladies' Garment Workers' Union v. Donovan,
722 F.2d 795 (D.C. Cir. 1983) 17

Mayhew v. Wells,
125 F.3d 216 (4th Cir. 1997) 13

Overnight Motor Transportation Co. v. Missell,
316 U.S. 572 (1942) . iv, v, vi, 2, 3, 4, 11, 12, 15
..... 17, 18

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 7

Valerio v. Putnam Associates, Inc.,
173 F.3d 35 (1st Cir. 1999) 12-13

Yourman v. Dinkins, 865 F.Supp. 154 (S.D.N.Y. 1994) 11

Zoltek v. Safelite Glass Corp., 884 F.Supp. 283 (N.D.Ill. 1995) 13

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

29 U.S.C. § 207(a)(1) 2, 12

29 U.S.C. § 213(a)(1) 2

29 U.S.C. § 216(b) 5

29 U.S.C. § 257 13

Regulations

29 C.F.R. § 778.114 ..... *passim*

29 C.F.R. § 778.114(c) 12

29 C.F.R. § 541.118 ..... 14, 15

Other Authorities

Department of Labor, Wage & Hour Opinion Letter Ruling No. 479 (May 18, 1966),

Labor Law Rep. (CCH) ¶30,997.18,
reprinted in Gilbert J. Ginsburg, et al.,
Fair Labor Standards Handbook
app. III at 104 (1996) 4, 5, 8, 9, 10, 11, 53a

Department of Labor, Wage & Hour Opinion Letter
dated 5/26/82 (Unreported) 9, 10, 55a

Department of Labor, Wage and Hour Opinion Letter
dated 2/27/95, 1995 WL 1032466 . 4, 8, 10, 65a

Department of Labor, Wage and Hour Opinion Letter
dated 3/28/96, 1996 WL 1031769 . 4, 8, 10, 62a

Department of Labor, Wage and Hour Opinion Letter
dated 12/24/97, 1997 WL 998050 . 4, 8, 10, 58a

Department of Labor, Wage and Hour Opinion Letter
dated 4/20/99, 1999 WL 1002390 . 4, 8, 10, 68a

OPINIONS BELOW

The opinion for the United States Court of Appeals for the Fifth Circuit is reported at *Samson, et al. v. Apollo Resources, Inc., et al.*, 242 F.3d 629 (5th Cir. 2001), and appears at Appendix A (page 1a). The Judgment issued from the United States District Court for the Western District of Louisiana is unreported, but appears at Appendix C (page 28a). The Additional Reasons for Judgment issued by the United States District Court for the Western District of Louisiana is also not reported, but appears at Appendix D (page 30a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit Court ("Court of Appeals") was entered on February 20, 2001. The Court of Appeals denied a timely filed Petition for Panel Rehearing on March 20, 2001. The Order for the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit is unreported, but appears at Appendix B (page 26a). This petition for writ of certiorari is filed within 90 days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

REGULATION INVOLVED IN CASE

The regulation involved is set forth in Appendix K (page 72a). It is 29 C.F.R. § 778.114 – Fixed Salary For Fluctuating Hours

STATEMENT OF THE CASE

A. Background Of Governing Law And Policy

In 1938, Congress passed the Fair Labor Standards Act (FLSA) that mandated, among other things, that non-exempt workers[1] must be paid time and one-half for all overtime hours. 29 U.S.C. § 207(a)(1). The purpose of the Act was to help ensure full employment by financially penalizing employers who choose to work their existing employees overtime hours rather than hire additional workers.[2] The circuit court's opinion below, along with recent decisions from other circuits, effectively negates Congress' will as enacted in the FLSA as well as this Court's decision in *Overnight Motor Transportation Co. v. Missell*, 316 U.S. 572 (1942).

Under the normal FLSA payplan, an employer pays the employee for the actual hours worked and in those weeks where the employee works more than 40 hours, the employer must pay time and one-half the hourly wage for those "overtime hours." This payplan can cause problems for both employers and employees when employees work "fluctuating hours." Under these circumstances, some employees are willing to forego their FLSA statutory right to time and one-half for overtime hours in

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[1] Non-exempt workers are defined as those who are not executives, administrators or professionals. 29 U.S.C. § 213(a)(1).

[2] *E.g.*, *Donovan v. Brown Equip. & Service Tools, Inc.*, 666 F.2d 148, 152 (5th Cir. 1982). Under the FLSA, an employer who chooses to work an existing employee more than 40 hours per week has to pay time and one-half for overtime hours, whereas the employer only has to pay straight-time wages if it hires another person to do the work instead. In the FLSA, Congress reasoned that it was better to have two employees working 40 hours per week than one employee working 80 hours and the other unemployed. Both situations cause family and societal problems; the unemployed worker cannot support his family and the other worker has no time to take care of family and parental responsibilities.

return for a guaranteed salary.[3] In 1942, this Court addressed the situation in *Overnight Motor Transportation Co. v. Missell*, 316 U.S. 572 (1942), wherein this Court authorized an employer to pay its nonexempt employees a guaranteed salary as long as the employer paid a small additional sum for overtime hours. The additional sum was to be calculated using the fluctuating workweek formula; the fluctuating workweek formula was invented before enactment of the FLSA and it essentially pays less than half-time for overtime hours (based on a decreasing sliding-scale) not time and one-half.[4] This Court allowed the employer to gain an advantage over its competitors (paying less than half-time for overtime hours rather than time and one-half) because the employer guaranteed that the salary would be paid in all situations no matter how many hours the employee worked.

In response to *Overnight Motor*, the U.S. Department of Labor (DOL) promulgated 29 C.F.R. § 778.114 which allows employers to use the fluctuating workweek formula to calculate overtime pay, but the DOL placed several restrictions/requirements on when an employer could use the 29 C.F.R. § 778.114 payplan. One of the restrictions/requirements is that the employer must pay the employee the agreed-upon guaranteed salary even in those weeks in which the employee

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[3] Employers receive the benefit of knowing their payroll costs in advance for planning purposes.

[4] Therefore, this pay method does not penalize employers who work their employees overtime as mandated by Congress in the FLSA. In fact, this pay method encourages employers to work their existing employees overtime hours rather than hire additional workers because the employer is allowed to pay only half-time wages to the existing employee who works overtime hours where it would have to pay full-time wages if it hired a new employee to work those hours instead.

works less than 40 hours.[5] Since *Overnight Motor*, this Court has not addressed its decision, nor has it addressed 29 C.F.R. § 778.114.

For employers who want to take advantage of the discounted overtime rate offered through 29 C.F.R. § 778.114, DOL (Wage & Hour Division) Letter Rulings clearly prohibit the employer from taking salary deductions, even when employees miss work due to "illness" (their own as well as family members), "personal business," "personal reasons" or "vacation."[6] The reason for the deduction prohibition is simple, in *Overnight Motor* this Court required the salary to be guaranteed in order for the employer to get to pay only half-time for overtime hours, instead of time and one-half.

B. Factual Background

Apollo utilized 29 C.F.R. § 778.114 to pay most of its employees. From late 1994 to 1996, the DOL investigated

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[5] This is the quid pro quo, the employee agrees to forego his/her statutory right to time and one-half in return for the security of a guaranteed salary and only "half-time" for overtime hours.

[6] 5/18/66 DOL Opinion Letter Ruling No. 479, Labor Law Rep. (CCH) ¶30,997.18, reprinted in Gilbert J. Ginsburg, et al., Fair Labor Standards Handbook app. III at 104 (1996)(Deductions from salary are prohibited when the employee misses work due to illness or personal business.)(App. 53a); 12/24/97 DOL Opinion Letter, 1997 WL 998050 (Salary deductions are prohibited when employee misses work for personal reasons or illness.)(App. 58a); 3/28/96 DOL Opinion Letter, 1996 WL 1031769 (Salary deductions are prohibited when an employee misses work due to vacation.)(App. 62a); 2/27/95 DOL Opinion Letter, 1995 WL 1032466 (Salary deductions are prohibited when an employee misses work for personal reasons or illness.)(App. 65a); 4/20/99 DOL Opinion Letter, 1999 WL 1002390 (Under 778.114 payplans, the employee's salary is guaranteed, "[t]herefore, no deductions in the employee's salary . . . are allowed.")(App. 68a).

Apollo's payment practices and found that it was making improper salary deductions from its employees' 778.114 payplans. The DOL found that 65 employees were owed $385,915, the vast majority of which was for improper salary deductions. The DOL sent notice letters to the affected employees informing them of the results of the investigation and their right to bring a private action against Apollo pursuant to 29 U.S.C. 216(b).

One of the employees who received a DOL notice letter was plaintiff Norman Landry. It is undisputed that Apollo docked Landry's guaranteed salary in weeks where he missed a few hours of work for personal business, illness and vacation. During his employment with Apollo, there were only four weeks where Landry worked less that 40 hours. In three of these weeks, Apollo docked his guaranteed salary even though Apollo had pre-approved all of the absences. One week in which Apollo took deductions was when Landry missed work for physician/diagnostic testing to determine the cause of severe headaches.[7] In the second week, Landry missed one day of work to move his family home.[8] In the third week that Landry's salary was docked, he was granted a vacation day (Friday) and Landry fully expected to be called in on the weekend. Instead, Apollo called in another welder, Landry did not work 40 hours that week, and Apollo docked his guaranteed salary anyway. Landry quit soon after finding out that his salary was docked for that week. At trial, Apollo freely

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[7] Landry is a welder and severe headaches caused potential safety problems for him, his co-workers who worked nearby and the persons who used the equipment welded by him.

[8] At trial, the judge stated, "I don't care what that opinion letter says" [referring to DOL Opinion Letter No. 479], that he was not going to make Apollo pay Landry the guaranteed salary when he missed a day of work to move his family (personal business). Trial Transcript pp. 1191-92 (R. at Vol. 22).

admitted that it docked its employees' guaranteed salaries when they missed work for personal business, Trial Transcript p. 53, ln. 8-12 (R. at Vol. 17), and that it had a policy of doing so. Trial Transcript p. 1221, ln 8-15 (R. at Vol. 22).

At trial, Apollo admitted that it did not change its deduction policies as a result of the DOL investigation and continued to take deductions in the same manner it did prior to the investigation. For example, Apollo took deductions from plaintiffs George Samson, Melvin Smith and Kevin Smith when they were sick.[9]

In the instant case, Apollo's employees averaged 60 hours per week even though most were told at the time of hiring that they would average only 40 hours per week.[10] Hence, Apollo saved substantial sums of money by paying only half-time for overtime hours.[11]

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[9] In addition to the plaintiffs' testimony that they were sick, all of Apollo's internal documents state that they were sick. Plaintiffs Trial Exhibits 10, 39, 41, 48 & 49.

[10] George Samson, Kevin Smith, Kyle Smith and Brent Manuel testified that they were told, at hiring, that they would have to work long weeks and short weeks but that they would average 40 hours per week. In actuality the typical Apollo employee had to go offshore to work on an oil rig for seven days, working 12 hours per day (84 hour weeks), and then on his return, when he was promised to be off the entire next week, he was called into work in Apollo's yard for another 35 hours. Then in the third week, he was sent offshore and the cycle started again.

[11] Apollo's employees typically earned $500 per week ($12.50/hour). In a week in which an employee worked 60 hours, under normal time and one-half payplans, the employee would have earned $875. Under the fluctuating workweek formula, the employee earned only $583.33. Under 778.114, the employee earned only $83.33 for the last 20 hours of work in that week.

C. Procedural History

The trial began with thirty plaintiffs and was scheduled to last one week. After one week, only six plaintiffs had testified and the district court realized that there were numerous legal issues that had never been addressed by the Fifth Circuit (and some that had not been decided by any court). So to save time, the parties and the district court agreed to sever the remaining plaintiffs into a separate trial and stay that action, finish the trial of the first six plaintiffs, take appeals to settle the legal issues, and then resume the trial for the remaining plaintiffs.

REASONS FOR GRANTING THE WRIT

I.

This Petition For Certiorari Involves Issues Larger Than The Proper Interpretation Of A Department Of Labor Regulation, Rather It Involves Whether A Circuit Court Can Substitute Its Own Interpretation Of An Agency Regulation Over That Of The Agency Who Promulgated And Enforces The Regulation On A Daily Basis

A. Applicable Supreme Court Law Provides That The DOL Is Entitled To Great Deference In Interpreting Its Own Regulations And The District And Circuit Courts Erred In Substituting Their Own Inconsistent Interpretation

As stated in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the DOL is entitled to great discretion in interpreting its own regulations. *See also, Skidmore v. Swift & Co.*, 323 U.S. 134,

139-140 (1944).

The district court admitted that it had no knowledge of 778.114 payplans before hearing this case, but yet the district court, as well as the circuit court, failed to give any deference to DOL's interpretation of 29 C.F.R. § 778.114. As stated by this Court, an agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997)("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.") Clearly, given the DOL's written opinion letters, Apollo's salary deductions violated DOL's interpretation of its own regulation. *See The Five DOL Opinion Letters Cited In Footnote 6 And Attached In The Appendix at 53a, 58a, 62a, 65a and 68a.*

Specifically addressing the DOL's 1966 Wage & Hour Opinion Letter No. 479, the district court stated that it did not care what Opinion Letter 479 said, that Landry would have to be a "mental midget" to think that he was going to be paid his guaranteed salary in the week he had personal business to move his family. Trial Transcript p. 1192 (R. at Vol. 22)

In addition to ignoring the DOL's written and published interpretation letters governing improper salary deductions, the courts failed to acknowledge that the DOL investigated Apollo and cited Apollo for taking improper deductions. So the courts ignored DOL's fact-finding as well as the DOL's own application of its regulations to Apollo's actual employment practices.[12] At trial, Apollo admitted that it did not change its deduction policies even after it was cited by the DOL. And by their decisions, the district and circuit courts reversed the DOL

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[12] At trial, Apollo admitted that the DOL was following the dictates of DOL Opinion Letter No. 479 when it cited Apollo. Trial Transcript p. 130, ln. 21-24; p. 56, ln. 21 - p. 57, ln. 16 (R. at Vol. 17).

and approved and affirmed the very deduction policies for which Apollo was cited.

B. A Decision By This Court Is Necessary To Provide Guidance To Lower Courts As To The Deference Agencies Should Be Given In Interpreting Their Own Regulations

In *Auer v. Robbins*, 519 U.S. 452, 461 (1997), this Court requested the DOL to submit an amicus brief to clarify the DOL's interpretation and earlier pronouncements on a wage and hour issue. Similarly, in *Samson v. Apollo*, to resolve any doubts, the plaintiffs requested the circuit court to request an amicus brief from the DOL and the circuit court chose not to do so.

The only opinion letter cited by the plaintiffs that was addressed by the courts was DOL's 1966 Letter Ruling No. 479. Fifth Circuit Opinion at App. 17a-19a; District Court Opinion at App. 48a-49a. Letter Ruling No. 479 states that salary deductions are prohibited when the employee misses work due to illness or personal business. Both courts speculated that the DOL had abandoned the deductions policy position stated in 1966 based on unrelated language in the 1967 Wage & Hour Field Operations Handbook that permits disciplinary deductions.[13] *Id.* However, both courts ignored

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[13] DOL Letter Ruling No. 479 and the Field Operations Handbook are talking about apples and oranges. DOL Letter Ruling No. 479 prohibits deductions when an employee misses work due to illness or for personal business while the Handbook addresses when disciplinary deductions may be made. The two provisions cover totally different kinds of absences and can be read together without conflict. The Handbook language on disciplinary deductions is also contained in an unpublished 1982 DOL letter the defendants referred to as the "Otter Letter" (App. 55a) and 1969 DOL Opinion Letter No. 988. In its investigation of Apollo, the DOL District Director distinguished the Otter

and failed to even acknowledge later opinion letters issued by the DOL, especially the ones issued in 1995, 1996, 1997 and 1999, wherein the DOL reiterated the position stated in its 1966 Letter Ruling No. 479 that salary deductions are not allowed in 29 C.F.R. § 778.114 payplans when employees miss work due to illness, personal business, personal reasons, vacation, etc. *See The Five DOL Opinion Letters Cited In Footnote 6 And Attached In The Appendix at 53a, 58a, 62a, 65a and 68a.*

Like the circuit court, the district court did not request an amicus brief from the DOL concerning the status of Wage & Hour Letter No. 479 and DOL's policy on allowable salary deductions. However, since the deduction policy issue was one of first impression for both courts, they should have requested amicus briefs from the DOL as to the agency's interpretation of its policy regarding impermissible salary deductions especially since the DOL's citation of Apollo, and the plaintiffs' case, were based on this issue.

In its opinion, this Court could take the opportunity to provide guidance to lower courts recommending that they should request amicus briefs from the applicable federal agency when the court is asked to interpret an agency regulation for the first time. This is especially true when the court "speculates" that the agency may have reversed a prior policy.

Similarly, the plaintiffs suggest that a DOL amicus brief might aid this Court in evaluating this cert petition with a minimum of effort. The Court would be helped by the longstanding expertise of the Labor Department in this area due to the technical workings of the Fair Labor Standards Act and

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Letter from the reasoning in Letter Ruling No. 479 in a letter he sent to Apollo explaining why Apollo was cited for taking improper deductions. Trial Transcript pp. 47-52, 56-57 (R. at Vol. 17). In their opinions, the courts failed to even acknowledge that, in this very case, the DOL addressed why the Field Operations Handbook language and Otter letter ruling did <u>not</u> apply, but the principles stated in Letter Ruling No. 479 <u>did</u> apply.

especially 29 C.F.R. § 778.114 payplans.

II.
The Issue Presented Has Important Federal Impact And Involves An Unsettled Question of Law That Should Be Settled By This Court With This Particular Case Because The Decision Below Subverts The Fair Labor Standards Act Overtime Provisions And This Court's Decision In *Overnight Motor*

A. Since No Other Circuit Court Has Evaluated The DOL's Position On Impermissible Salary Deductions, The Fifth Circuit's Decision Provides The Only Interpretation Of The Issue For The Nation And That Decision Allows Employers To Undermine The Intended Protections Afforded To Employees By The Fair Labor Standards Act And This Court's *Overnight Motor* Decision

No other circuit court has evaluated the DOL's position on salary deductions under 29 C.F.R. § 778.114 payplans.[14] As such, if permitted to stand, the Fifth Circuit's decision in *Samson v. Apollo* will be law for the country. In its opinion, the Fifth Circuit allows employers to not pay the guaranteed salary when their employees do not work a full 40 hours, but yet the

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[14] Two district court opinions have recently cited DOL's Wage & Hour Opinion Letter No. 479 as being good law, and one of these opinions even comes from a lower court in the Fifth Circuit. *Yourman v. Dinkins*, 865 F.Supp. 154, 164-65 (S.D.N.Y. 1994), *quoting*, Wage & Hour Opinion Letter No. 479, *aff'd*, 84 F.3d 655 (2nd Cir. 1996), *rev'd on other grounds*, *Giuliani v. Yourman*, 519 U.S. 1145 (1997); *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 895 at FN 24 & 25 (E.D.Tex. 1997).

employers can still calculate overtime pay using the fluctuating workweek formula (instead of time and one-half). The Fifth Circuit ignored this Court's previous directive by eliminating the quid pro quo that was the basis of the *Overnight Motor* decision (i.e., the employee agrees to forego his statutory right to time and one-half for overtime hours in return for a guaranteed salary) and the basis for DOL's 29 C.F.R. § 778.114 regulation.

Armed with this Fifth Circuit decision, employers will begin to use 778.114 payplans as opposed to the general payplan set-out by Congress in the Fair Labor Standards Act at 29 U.S.C. § 207(a)(1)(time and one-half for overtime). By using 778.114 payplans, these employers will be able to circumvent Congress' express will to "economically punish" employers who decide to work existing employees overtime hours rather than hire unemployed or underemployed workers who may be on welfare and unemployment. *E.g.*, *Donovan v. Brown Equip. & Service Tools, Inc.*, 666 F.2d 148, 152 (5th Cir. 1982).

B. This Court Needs To Provide Guidance On 29 C.F.R. § 778.114 Payplans As The Fifth Circuit's Decision And Recent Decisions From Other Circuits Have Systematically Eroded Employee Protections Established By This Court And Congress

Another DOL limitation on use of 29 C.F.R. § 778.114 payplans is that the parties must agree that the pay is adequate "under the circumstances of the employment as a whole." 29 C.F.R. § 778.114(c). On its face, the provision requires that the employee must agree to be paid under 29 C.F.R. § 778.114 before the employer can enjoy the benefits of the 778.114 payplan. However, recent court decisions from other circuits have disagreed with this logical interpretation. *See*, *Valerio v.*

Putnam Associates, Inc., 173 F.3d 35, 39 (1st Cir. 1999)(employer can pay overtime according to fluctuating workweek formula even when the employer and employee have not agreed on how overtime will be calculated); *Mayhew v. Wells*, 125 F.3d 216, 218-20 (4th Cir. 1997); *Zoltek v. Safelite Glass Corp.*, 884 F.Supp. 283, 286-87 (N.D.Ill. 1995). These decisions, along with the Fifth Circuit decision below, abrogate Congress' overtime mandate because an employer can now pay only half-time for overtime hours, take deductions for absences and do all this without the employees' consent.

C. The Issue Presented In This Petition Is Ripe For Decision And This Court Should Decide The Issue Now Because Similar Cases Rarely Rise To This Level

The Court should take the opportunity to decide the issue presented in this cert petition in lieu of waiting for the issue to arise through a later case. Wage and hour cases are very expensive to litigate and there is no guarantee that other circuits will even hear cases on point, much less have the issues reach this Court. Blue-collar workers cannot afford to pay the hourly fees involved in bringing a wage and hour lawsuit much less the costs of appeal. Further, it is rarely economically feasible for attorneys to take these cases on a contingency fee basis especially when there is negative precedent from a circuit court, as there is here, and wage and hour cases do not qualify for class action status. 29 U.S.C. § 257.

It is doubtful that the Department of Labor will raise the issue on appeal as the DOL's Solicitor's office is understaffed and must allocate its resources to the hundreds of other statutes and regulations it enforces. The DOL's limited resources, coupled with the expensive cost of litigating wage and hour cases, has resulted in few cases involving 29 C.F.R. § 778.114 payplans being presented to this Court, much less ones

involving improper salary deduction issues.

Even if litigation costs were not so expensive, it would be better to handle the issue now rather than let employers change their conventional payroll systems to 29 C.F.R. § 778.114 payplans based on the erroneous Fifth Circuit decision. Given current delays in the judicial system, it will take many years before these new payplans can be litigated, appealed and cert petitions filed. So it could be several years before this Court would have its next opportunity to undo the damage that has been done by the circuit court's decision.

III.

The Plaintiffs Are Only Asking This Court To Do For Blue-Collar Workers What It Did For White-Collar Workers In *Auer v. Robbins*, 519 U.S. 452 (1997), Namely To Affirm The DOL's Policies Regarding Permissible And Impermissible Deductions From Pay

The plaintiffs are only asking this Court to do for blue-collar workers what it did for white-collar workers in *Auer v. Robbins*, 519 U.S. 452 (1997)(J. Scalia), namely to affirm the DOL's regulatory interpretations regarding impermissible salary deductions. In *Auer*, this Court affirmed that DOL's interpretation of 29 C.F.R. § 541.118 was controlling over lower court opinions. *Id.* at 456-458. (29 C.F.R. § 541.118 governs salaries for white-collar workers–i.e., executives, administrators and professionals. The DOL's interpretation of that regulation prohibits the employer from making salary deductions for disciplinary reasons. *Id.* at 456-458.)

In *Samson v. Apollo*, both the district and circuit courts refused to apply *Auer* to this case. The circuit court refused to even address *Auer* even though it was cited and discussed in the

plaintiffs' briefs. The District Court said that the reasoning in *Auer* only applied to white-collar worker payplans (salaried payplans governed by 29 C.F.R. § 541.118) and not to blue-collar worker payplans (salaried payplans governed by 29 C.F.R. § 778.114). App. 49a.

The plaintiffs are merely asking this Court to enforce for blue-collar workers what it enforced for white-collar workers in *Auer*—that the DOL's interpretation of its own regulations trumps that of lower Federal courts. Specifically, the DOL's interpretations on impermissible salary deductions, as enunciated in numerous DOL opinion letters, should be controlling.

IV.

It Is Time For The Court To Revisit The Policies It Created In 1942 In *Overnight Motor*, And Address The Proper Application Of 29 C.F.R. § 778.114 Payplans

In the 1942 *Overnight Motor* decision, this Court created a narrow exception to Congress' mandate that time and one-half should be paid for all overtime hours. In the opinion, this Court limited its application to very specific circumstances, the main one being that the employer must guarantee the salary in exchange for the lower overtime rate. However, the circuit court's decision below has eliminated the guaranteed salary requirement while still allowing the employer to avoid Congress' overtime requirement. Further, in its opinion below, the circuit court disregarded many established policies set by Congress. The circuit court's opinion should be reversed to prevent it from being cited as recent (hence valid) precedent in lieu of this Court's *Overnight Motor* decision.

A. The Plaintiffs In This Case Are

Representative Of The Types Of Blue-Collar, Family-Supporting Employees The FLSA Was Designed To Protect

The FLSA was designed to protect typical blue-collar workers because, without union protection, they lack the negotiating power of their employers. *E.g.*, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-707 (1945).[15] Further, 29 C.F.R. § 778.114 payplans are designed for those non-exempt workers who need the security of a consistent, guaranteed paycheck and are willing to forego their statutory right to time and one-half overtime for that security.

Of the six plaintiffs, five had small children at the time they worked for Apollo and three were single fathers who had custody of their children. They were doing their best to support their children without welfare and the guaranteed and consistent salary was critical to their financial survival. These plaintiffs gave up tens of thousands of dollars in time and one-half overtime in return for the promise of a guaranteed salary. These employees counted on the security of a guaranteed salary when they had to miss work due to illness or personal business, but Apollo still took improper deductions in weeks where 40 hours were not worked.[16] These working parents were held hostage in their employment by Apollo because, given their family financial obligations, they could not quit before they secured a replacement job, and averaging 60 hours per week for

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[15] These types of workers do not have specialized skills, like white-collar workers, so an employer can easily fire and replace them with another requiring little or no additional training.

[16] Apollo's own expert described this as the employer "wanting its cake and eating it too" because the employer did not want to have to pay time and one-half for overtime work but yet was unwilling to pay the full guaranteed weekly salary when the employee could not work 40 hours.

Apollo left little time to look for another job.

Through the FLSA and other statutes, Congress and this Court have unequivocally stated that the plaintiffs herein are the types of workers they want the lower courts to protect from unscrupulous employers. The circuit court failed to acknowledge the mandates of Congress and this Court. If the courts refuse to uphold Congress' clear intentions, employees will be forced to turn to unions as their sole source of protection from employers who fail to follow Congress' mandates. With more union employment agreements, the courts will lose their power of influence and interpretation over many of our country's employment laws because wage and hour issues will be governed by the applicable union contract and not Federal statutory and regulatory laws.

B. The Fifth Circuit's Decision Gives An Unfair Advantage To Those Employers Who Fail To Abide By The Restrictions Of 29 C.F.R. § 778.114 Over Those Employers Who Follow The Spirit of Congress As Enunciated In The FLSA And This Court In *Overnight Motor*

In addition to protecting employees, the FLSA's enforcement mechanisms are also meant to "deprive a violator of any gains accruing to him through his violation" and "to protect those employers who comply with the Act's wage requirements from having to compete unfavorably with those who fail to comply." *Donovan v. Brown Equip. & Service Tools, Inc.*, 666 F.2d 148, 157 (5th Cir. 1982). "It is clear that the Fair Labor Standards Act was meant to protect compliant employers," *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 at FN 23 (D.C.Cir. 1983), and "Congress passed the Act partly to provide redress to employers from unfair competition." *Id.* at 811-12.

Plaintiff Melvin Smith testified that one of Apollo's

competitors, Safeguard Disposal Systems, his current employer, pays overtime rates of $24 per hour to employees who make $16 per hour regular time. Trial Transcript p. 863, ln. 7-19 (vol. 20). At the same time, under the fluctuating workweek formula, Apollo paid similar employees overtime rates, pursuant to the fluctuating workweek formula, ranging from a high of $7.80 (41st hour) down to $1.29 (100th hour).

Apollo gained an unfair competitive advantage over its competition by misapplying the 29 C.F.R. § 778.114 regulations and the DOL interpretations governing that payplan. Using the above paygrades, for a typical 84-hour week of work on an offshore oil rig, Safeguard paid its employee $1696.00 while Apollo paid only $807.62.

V.
CONCLUSION

In this case, the Court of Appeals has so far departed from the accepted and usual course of judicial proceeding, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The *Overnight Motor* decision and DOL's 29 C.F.R. § 778.114 payplan were meant to cover only a small class of employment situations and imposed very specific requirements for its use. However, the circuit court's decision effectively eliminates the guaranteed-salary requirement mandated by this Court and the DOL and impermissibly allows the employer to expand the use of 29 C.F.R. § 778.114 payplans beyond that contemplated by this Court and the DOL. As such, if left unchecked, this decision, along with decisions from other circuits, have the power of undoing the overtime provisions of the Fair Labor Standards Act that are currently a fixture of compensation systems for blue-collar workers.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

/s/ _____

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

[Decided February 20, 2001]

Nos. 99-30304, 99-30306 and 99-30407

George C. SAMSON, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants
v.
APOLLO RESOURCES, INC., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

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Lester D. Weaver; Crawford R. Norton,
Plaintiffs-Appellants
v.
Apollo Resources, Inc., doing business as Apollo Services, Inc.,
Defendant-Appellee

****

George C. Samson, III, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants
v.
Apollo Resources Inc., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

Appeals from the United States District Court
for the Western District of Louisiana
No. 97-1053–Richard T. Haik, Sr., *Chief Judge*
Mildred E. Methvin, *Magistrate Judge*

Before KING, Chief Judge, PARKER, Circuit Judge, and FURGESON, District Judge. [1]

OPINION

FURGESON, District Judge:

This case involves a dispute over the applicability and administration of the Fluctuating Workweek ("FWW") method for calculating employees' salaries and overtime wages. We review the district court's judgment rendered for the Defendant in a non-jury trial pursuant to Fed.R.Civ.P. 52(c). For the reasons stated herein, we affirm.

FACTS

The Plaintiffs--George C. Samson, Jackie D. Hays, Brent C. Manuel, Kevin D. Smith, Norman J. Landry, and Melvin K. Smith--are former employees of the Defendant Apollo, Inc. ("Apollo"). Apollo is an oilfield services company based in Louisiana. Its president and sole shareholder is Jeffrey A. Reddoch, who is also named as a defendant in the suit. Plaintiffs worked on Apollo's offshore rigs as well as in its yard. During their employment, they were paid under a fluctuating workweek ("FWW") or sliding-scale method. This method is used primarily by employers whose employees may

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[1] District Judge of the Western District of Texas, sitting by designation.

be called upon to work a fluctuating number of hours each week. Apollo adopted the FWW method in 1991-- after consultation with Don Strobel, then an Assistant District Director of the Wage and Hour Division of the Department of Labor ("DOL")--as a means of complying with the Fair Labor Standards Act ("FLSA") and meeting its own employment needs.

Under Apollo's policy, the employees received a fixed monthly wage plus a weekly overtime premium for each hour worked over forty. Unlike the standard "time and one-half" overtime premium, Apollo calculated the overtime premium by first dividing the monthly wage amount by 4.3 to arrive at the fixed weekly wage. Then each employee's weekly wage was divided by the actual number of hours worked by that employee for that particular week. This figure represented the employee's "regular rate of pay"[2] for that workweek. Under this method, the "regular rate of pay" fluctuates from week to week depending on the actual number of hours worked by the employee. Apollo then paid the employee an additional one-half of that workweek's regular rate of pay for each hour worked over forty as an overtime premium. In other words, the employees received a fixed salary for all hours worked in any workweek plus one-half times the regular rate of pay for all hours worked over forty in that workweek. As part of its administration of the FWW method, Apollo made deductions from an employee's fixed salary in workweeks where the employee was willfully not available for work. These

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[2] For example, if an employee works 60 hours in a given week and his fixed weekly salary is $500, then his "regular rate of pay" per hour is $8.33 for that week. If the employee works 50 hours in a given week and his fixed weekly salary is $500, then his "regular rate ofpay" per hour is $10 for that week.

deductions, however, were taken only when the employee had not yet worked forty hours in that workweek.

PROCEDURAL HISTORY

Originally, twenty-six plaintiffs brought suit against Apollo under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., the Louisiana Wage Statute, La.Rev.Stat. Ann. § 23:631 and § 23:632, and general employment contract law. They complained that Apollo's use of the FWW method, pursuant to 29 C.F.R. § 778.114, was unlawful because the employees frequently worked more than sixty hours in a week without receiving an additional overtime premium. The employees further claim that even if Apollo was allowed to use the FWW method, Apollo improperly administered the plan (1) by failing to meet the "clear mutual understanding" provision prior to implementing the plan as required by § 778.114 and (2) by taking wrongful deductions from their wages. Plaintiffs claim back wages and damages as a result.

Prior to trial, Apollo filed a motion in limine to restrict the introduction of evidence regarding non-employment business practices of Apollo and its owners, Jeffrey and Chiquita Reddoch. The trial court granted Apollo's motion in limine. In addition, the parties stipulated that the case would be severed after the completion of all testimony and evidence as to six of the Plaintiffs--Samson, Hays, Manuel, Smith, Landry and Smith--and that all remaining proceedings would be stayed. The case then proceeded to a bench trial. At the close of Plaintiffs' case-in-chief, Apollo moved for judgment under Fed.R.Civ.P. 52(c). The trial court granted Apollo's motion in favor of Apollo on all of the claims, determining that Apollo did not violate the FLSA, the Louisiana Wage Statute or any general contract law. The Plaintiffs timely appealed.

The Plaintiffs raise numerous points of error on appeal. These points present four main issues: (1) whether Apollo may utilize the FWW method to pay its employees when the employee works more than sixty hours in a given week but does not receive an additional overtime premium (above one-half the regular rate); (2) even if Apollo may properly use the FWW method, whether it was properly administered by the company; (3) what damages, costs, and attorney's fees are Plaintiffs entitled to, if any; and (4) whether the district court erred in granting Apollo's motion in limine.

STANDARD OF REVIEW

Judgment entered under Rule 52(c) is made after the district court has heard all of the "evidence bearing on crucial issues of fact." Fed.R.Civ.P. 52(c) advisory committee's notes. Findings of fact made pursuant to a Rule 52(c) judgment are reviewed only for clear error. *Southern Travel Club v. Carnival Air Lines, Inc.*, 986 F.2d 125, 128 (5th Cir.1993). When the findings of fact are based on determinations regarding the credibility of witnesses, Rule 52 demands "even greater deference to the trial court's findings." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The trial court's conclusions of law, however, are reviewed *de novo*. *Ivy v. Jones*, 192 F.3d 514 (5th Cir.1999). Evidentiary rulings are reviewed for"abuse of discretion." *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir.1994).

DISCUSSION

The Fair Labor Standards Act generally requires that employees be paid an overtime premium of "time-and-one-half"

for all hours worked in excess of forty hours in a week. 29 U.S.C. § 207(a). The Department of Labor provides to employers various methods for calculating overtime compensation to suit different employment needs while still complying with § 207(a). One such method is the Fluctuating Workweek method. 29 C.F.R. § 778.114 (stating the guidelines governing the use of the FWW method). Under the FWW method, the employee receives a fixed salary as compensation for all hours worked by the employee, whether above or below forty hours, as well as an additional overtime premium for each overtime hour. *Id.* § 778.114(a). The overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee actually works in a particular week to yield the employee's "regular rate of pay." *Id.* The employee is paid an overtime premium of one-half his regular rate of pay for each overtime hour. This premium is in addition to his fixed weekly salary. Under the FWW method, the employee is effectively earning time-and-a half as overtime pay. However, his hourly wage and the actual amount of overtime pay he earns decreases the more hours that he works. The fixed salary must be sufficient to provide compensation at regular rate meeting the minimum wage requirement of 29 U.S.C. § 206(a)(1), and the overtime premium cannot be less than one-half the regular rate of pay. 29 C.F.R. § 778.114(c). *Condo v. Sysco Corp.*, 1 F.3d 599, 601 (7th Cir.1993), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994); *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 893 (E.D.Tex.1997).

I. May an employer use the FWW method when the employee works more than sixty hours in a given week without paying the employee an additional overtime premium?

The Plaintiffs contend that the trial court erred in determining that the FWW method may be used when an employee works more than sixty hours in a week and no additional overtime premium (above one-half the regular rate) is paid for those hours worked over sixty. Because this issue raises a question of statutory interpretation and application and this is a question of law, we review the district court's ruling on this issue *de novo*.

29 C.F.R. § 778.114(c) states, in relevant part, that:

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot rely on any application of the fluctuating workweek method.

From this provision, the Plaintiffs extrapolate the contention that if an employee works in excess of sixty hours in a workweek, then the employer must pay the employee an overtime rate of more than the one-half the regular rate of pay minimally required by § 778.114(a). Otherwise, as Plaintiffs argue, the rate of pay for each overtime hour (including the overtime premium) is less than the rate of pay for nonovertime hours, in violation of § 778.114(c). This arguments turns on the definition of the rate of pay for nonovertime hours.

The Plaintiffs assert that dividing the fixed weekly salary by forty hours yields the rate of pay for nonovertime hours referred to in the last sentence of § 778.114(c). This contention rests on the assumption that the hourly rate for nonovertime hours is determined by dividing the fixed weekly salary by forty hours. Under this assumption, after sixty hours, the rate of pay for each overtime hour is less than the rate of

pay for each hour that the employee would have received if he had worked only forty hours.

To illustrate, under the FWW method, an employee who is paid a salary of $500 a week and who works only forty hours, effectively makes $12.50 per hour.[3] In a week where the employee works sixty hours, the overtime rate for hours forty-one to sixty is $12.50 per hour ($8.33 an hour "regular rate,"[4] plus $4.17 per hour as overtime premium[5]). In a sixty-one hour week, however, the employee's overtime rate drops to $12.30 an hour for hours forty-one through sixty-one ($8.20 per hour as "regular rate," plus $4.10 per hour overtime premium). When the employee works eighty hours in a week, the overtime rate drops to $9.38 ($6.25 at hour as "regular rate," plus 3.23 as an overtime premium). As these examples show, under the Plaintiffs' model, the more hours that an employee works, the lower his rate of pay per overtime hour becomes. After sixty hours, unless an overtime premium of greater than one-half the regular rate is paid, the rate of pay for overtime hours is no greater (but is actually less) than the rate of pay that the employee would receive if he had worked no overtime at all, i.e., if he only worked forty hours.

The Plaintiffs assert, therefore, that § 778.114(c) should be read as prohibiting the use of the FWW method for weeks where the employee works over sixty hours without receiving more than one-half the regular rate as the overtime premium because in such weeks the "employee is being paid for overtime

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[3] $500/40 hours = $12.50 per hour.

[4] Regular rate = fixed weekly salary ($500) divided by total hours worked (60).

[5] The minimally required overtime premium is one-half the regular rate of pay for that week.

hours at a rate not greater than that which he receives for nonovertime hours." 29 C.F.R. § 778.114(c). Though the Plaintiffs' interpretation is facially appealing, it is an incorrect reading of section 778.114(c) and the principles of the FLSA.

Section 778.114(a) makes clear that the fixed weekly salary compensates the employee for all hours worked, including overtime hours. Therefore, since the employee already receives 100 % of his regular rate of pay for each overtime hour worked, the time and one-half overtime provision of 29 U.S.C. § 207(a)(1) requires that the employee receive only an additional 50% of his regular rate for each overtime hour. *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir.1993).

The fallacy of the Plaintiffs' reading of § 778.114(c) lies in their interpretation of the rate of pay for nonovertime hours. Under the Appellant's model, the rate of pay for nonovertime hours erroneously includes overtime wages already built into the fixed salary. As § 778.114(c) makes clear, the fixed salary paid under the FWW method is not intended as compensation only for the forty hours traditionally recognized as nonovertime hours but for all "hours worked each workweek, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a). Accordingly, the fixed weekly salary necessarily includes compensation intended for overtime hours. *See id.* (noting that the FWW method complies with the overtime pay requirement of 29 U.S.C. § 207(a)(1) because overtime hours "have already been compensated at the straight time regular rate").

If a fixed salary includes a premium for overtime hours, then this premium must be deducted before calculating the rate of pay for nonovertime hours so that the actual rate of pay for nonovertime hours is not inflated by the overtime premium. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464, 463-64,

68 S.Ct. 1186, 92 L.Ed. 1502 (1948) ("When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay."). As such, Plaintiffs' calculation of the rate for nonovertime hours is artificially high because it includes compensation intended for overtime hours. In order to accurately compare the nonovertime hourly rate of pay to the overtime hourly rate of pay, the portion of fixed salary intended as payment for overtime must be deducted. 29 C.F.R. § 778.114(a).

A reading of § 778.114 suggests that rather than requiring employers to calculate and deduct the overtime premium on a week to week basis for all their employees for the purpose of determining compliance with the overtime requirement, § 778.114 is a *fait accompli*. That is, so long as the regular rate of pay does not fall below the minimum hourly wage requirements, "[p]ayment for overtime hours at one-half [the regular rate] in addition to the salary satisfies the overtime pay requirement" regardless of whether or not they exceed sixty hours. 29 C.F.R. § 778.114(a); *See Aaron v. City of Wichita, Kansas*, 54 F.3d 652, 657 (10th Cir.1995); *see also Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir.1997) ("Since the employer has already paid the employee a regular rate of pay for all of the hours that the employee worked, including the overtime hours, it only has to pay an additional one-half time pay premium for the overtime hours.").

If § 778.114(a) already states the overtime pay requirement is satisfied when the employee is paid one-half times the regular rate for overtime hours in addition to the fixed salary, then what is the proper interpretation of the last sentence of § 778.114(c)?

[W]here all the facts indicate that an employee

> is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot rely on any application of the fluctuating workweek method.

29 C.F.R. § 778.114(c). According to the Plaintiffs, this sentence of § 778.114(c) prohibits the employer from using the FWW method for weeks where the employee works over sixty hours and does not receive more than one-half the regular rate as the overtime premium in addition to the fixed salary. Any other interpretation, the Plaintiffs contend, would render the last sentence of § 778.114(c) surplusage.

A more likely reading of § 778.114(c), however, is that an employer cannot apply the overtime hours that an employee works in one week to another week in the same pay period where the employee works less than forty hours in order to avoid paying the overtime premium. The FWW method and the FLSA determine whether overtime pay is required by examining the number of hours worked in an individual week. Employers, however, may issue pay checks on a bi-weekly or monthly basis--commonly referred to as the "pay period." Therefore, rather than being surplusage, § 778.144(c) is meant to ensure that an employee is always paid an overtime premium for each hour worked over forty hours in a given week, regardless of the number of hours worked in earlier, or later, weeks within the same pay period. *See Cash*, 2 F.Supp.2d at 895 n. 24 (holding that section 778.114(c) is meant to prohibit the practice of cutting salary for a week in which less than forty hours is worked in order to counterbalance compensation for hours over forty worked in another week of the same pay period).

The Court finds that the FLSA and 29 C.F.R. §

778.114(c) does not prevent an employer from using the FWW method where the employee works over sixty hours and the overtime premium paid is not more than 50% of his regular rate.

II. Was the FWW method properly administered by Apollo?

The Plaintiffs assert that the trial court erred in its finding that Apollo properly administered the FWW method. First, they argue that the trial court erred in finding that the "clear mutual understanding" prerequisite was met. Second, the Plaintiffs contend that the deductions made to their salaries violated federal and/or Louisiana state law. The Court is unpersuaded by these arguments and affirms the district court's rulings.

A. Burden of Proof

Generally, a plaintiff suing under the FLSA carries the burden of proving all elements of his or her claim. In a suit for the payment of overtime wages, the employer claiming that the suing employee is exempt from the overtime requirement has the burden of proving that the employee falls within the claimed exempted category. *Dingwall v. Friedman Fisher Assoc.*, 3 F.Supp.2d 215, 218 (N.D.N.Y.1998). This Court has never directly addressed the issue of which party--whether the employer or the employee--has the burden of proving compliance with the requirements of the FWW method. We hold that the employee has this burden.

As its name implies, the FWW method is one method of complying with the overtime payment requirements of 29 U.S.C. § 207(a)(1). It is not an exemption to it. See 29 C.F.R.

§ 778.2 (noting that the subpart of 778, which includes the FWW method, does not discuss any specific exemptions to the overtime or minimum wage payment requirements of the FLSA); *Griffin v. Wake County*, 142 F.3d 712, 715 (4th Cir.1998); but *see Dingwall v. Friedman Fisher Assocs.*, 3 F.Supp.2d 215, 221 (N.D.N.Y.1998) (determining that the FWW is "an exception to the normal rights of the employee and thus the employer bears the burden of proving that all the requirements for applying the method are present"). Therefore, the employee bears the burden of proving that the employer failed to properly administer the FWW method. *Cash*, 2 F.Supp.2d at 896 ("The employee alleging an improper application of the fluctuating workweek method bears the burden of proof.").

B. Clear Understanding Requirement

The Plaintiffs contend that the trial court erred in finding that the "clear understanding" criterion required by § 778.114 was met. They assert two points here. First, they claim that Apollo misrepresented the number of hours that the employees would be called upon to work, specifically that Apollo made misrepresentations about comparable amounts of time off. For example, they argue that Apollo told employees that if an employee was required to work five days on the rig, then he would get a comparable five days off the rig. Second, the Plaintiffs assert that Apollo failed to disclose that it was not obligated to pay the employees the fixed salary for weeks in which the employee was not called upon to work at all. They argue that they could not have formed the clear understanding of the FWW method as a matter of law given these misrepresentations.

Again, these arguments are unpersuasive. Section

778.114 is specific as to what the employee must understand before the FWW method may be used. It only requires that "[t]here is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a); 29 C.F.R. § 778.114(c) (prohibiting the use of the FWW method "unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked"); *see, e.g., Griffin*, 142 F.3d at 716 (reading the clear understanding requirement as only encompassing the fact that the fixed salary was compensation for all hours that the employee worked); *Cash*, 2 F.Supp.2d at 907 (adopting and applying this standard of the clear mutual understanding requirement). We decline to expand the "clear understanding" requirement of section 778.144 to include the details cited by the Plaintiffs. *See, e.g., Griffin*, 142 F.3d at 717 (finding that the FLSA does not require that the "employer hold an employee's hand and specifically tell him or her precisely how the payroll system works"). Section 778.114 does not require that the employee know the hours expected to be worked, that the fixed salary is not be paid for weeks where the employee performs no work, or any other details of how the FWW is administered. *Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir.1996) (determining that neither section 778.114 nor the FLSA "in any way indicates that an employee also must understand the manner in which his or her overtime pay is calculated").

In addition, even taking into account the misrepresentations alleged by the Plaintiffs, the Court finds no basis for disturbing the trial court's finding that the "clear

mutual understanding" criterion was satisfied. These allegations of misrepresentation were already considered by the trial court and soundly rejected. In fact, the trial judge determined that Apollo went above and beyond what was required by § 778.114. The evidence in the record indicates that Apollo took the necessary steps to explain the FWW method to employees. The record is replete with testimony that Kelly Boudreaux and Ben Stonecipher explained to the Plaintiffs that they would be paid a fixed salary regardless of the hours that they were called on to work. In certain instances, Boudreaux and Stonecipher used formula sheets to illustrate this point. After hearing this testimony and weighing the credibility of the testimony, the district judge found that Apollo took every opportunity to explain the fixed salary provision of the FWW method to the Plaintiffs. The evidence shows that the Plaintiffs did have or should have had a clear understanding that they would be paid a fixed salary under the FWW method. And Plaintiffs cite to nothing in the record sufficient to show that the trial court's findings were clearly erroneous. To the contrary, the evidence in the record adequately supports the trial court's findings that Apollo met the clear understanding requirement.

C. Did Apollo improperly administer the FWW method by taking deductions from the employees' fixed salaries for willful absences?

1. Louisiana State Law

Plaintiffs next argue that the trial court erred in finding that Apollo's practice of making deductions from the employees' salaries for willful absences was allowed by federal and state law. Plaintiffs point to La.Rev.Stat. Ann. § 23:635. Section 23:635 states, in relevant part, that:

> No person, acting either for himself or as agent or otherwise, shall assess any *fines* against his employees or deduct any sum *as fines* from their wages.

La.Rev.Stat. Ann. § 23:635 (West 1999) (emphasis added). Because § 23:635 is penal in nature, Louisiana jurisprudence requires that it must be strictly construed. *See, e.g., Hanks v. Shreveport Yellow Cabs*, 187 So. 817, 819 (La.App.1939).

As this statute makes clear, not all deductions are prohibited; only fines or deductions made as fines are prohibited. The term "fines" has a very specific and limited meaning. "A fine, within the meaning of [section] 23:635, is a pecuniary penalty imposed for the violation of some law, rule or regulation." *Brown v. Navarre Chevrolet, Inc.*, 610 So.2d 165, 170 (La.App. 3rd Cir.1992). The few cases discussing § 23:635 restrict employers from levying fines on the employee (via deductions from wages) for failing to follow workplace procedures and regulations. *Brown*, 610 So.2d at 168, 170 (finding that deductions made because employee arrived late for meetings, and parked company car in wrong place were fines and, therefore, prohibited by § 23:635); *Stoll v. Goodnight Corp.*, 469 So.2d 1072, 1077 (La.App. 2 Cir.1985) (determining that requiring employee to reimburse employer for bad checks written by customers was not a fine where agreement existed between parties that employee would cover such losses); *Hanks*, 187 So. at 819 (holding that employer's charges against driver-employee for damages to a cab were not fines because the charge was used to cover cost of repair to cab and employee agreed to be responsible for such damage).

Under a strict construction of the term fines, the deductions made by Apollo for willful absences or tardiness do not constitute a fine so as to be prohibited by Louisiana law.

The deductions were not "arbitrarily fixed and assessed" as punishment against the employee for violating a work place rule or regulation. *Hanks*, 187 So. at 819 (clarifying the characteristics that distinguish a fine from a lawful deduction). Rather than acting as a fine or punishment, the deductions allowed Apollo to avoid paying an employee for wages to which he was not otherwise entitled. While failing to show up for work when called is certainly a "violation" of a workplace "rule" requiring attendance, no authority exists in either § 23:635 or 29 C.F.R. 778.114 requiring the employer to pay employees for times which the employee intentionally skips work. Therefore, § 23:635 did not prohibit Apollo from making deductions from the Plaintiffs' salaries for willful absences.

2. Federal Law

Section 778.144 itself is silent on the issue of whether such deductions are permissible under the FWW method. The Plaintiffs' only support for their contention that deductions are not permitted under the FWW method is DOL interpretive letter No. 479, written in 1966. Letter No. 479 states, in relevant part, that "[d]eductions for less than a week, whether for illness, personal business, or other reasons, may not be made under [the FWW] method of compensation." Later DOL opinion letters and materials, however, state otherwise. DOL Opinion Letter No. 988, written in May 1969, states that under the FWW method "occasional disciplinary deduction for wilful absence or tardiness may be made." This letter tracks the language of the DOL's Field Operations Handbook, published in 1967, regarding disciplinary deductions under the FWW method. The 1967 Handbook recognizes that an employer may make "occasional disciplinary deductions for wilful absence or

tardiness." Department of Labor, Field Operations Handbook § 320b04b (1967). Furthermore, a 1982 letter--referred to as the Otter Letter--states that "[o]ccasional deductions may be made [from an employee's salary] as a disciplinary measure for willful absence or tardiness." The problem here is resolving which of the conflicting DOL pronouncements should apply. When faced with an issue involving statutory construction, federal courts show "'great deference to the interpretation given the statute by the officers or agency charged with its enforcement.'" *Biggs v. Wilson*, 1 F.3d 1537, 1543 (9th Cir.1993) (*quoting Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)). Interpretive and opinion letters by the Department of Labor do not *per se* bind the court. Such materials, however, do "constitute a body of experienced and informed judgment" and the court will give these materials "substantial weight." *Flood*, 125 F.3d at 253 (citation omitted).

The Plaintiffs correctly point out that the 1969 and 1982 letters are unpublished pronouncements of the DOL's interpretation of the FWW method. They further contend that since the letters are unpublished this Court should not rely upon them. But the fact that they are unpublished does not dismiss entirely the persuasive value and insight that they may provide this Court, especially in light of their consistency with the Field Operation Handbook. Unpublished opinion letters by a government agency still reflect the agency's interpretation and intended application of the regulation. The Court finds that the survey of the available material from the DOL indicates that occasional deductions for wilful absence or tardiness are not prohibited under the FWW method. *See Cash*, 2 F.Supp.2d at 895 ("[The FWW method] however, in no way bars 'occasional' deductions from salary for 'wilful absences or tardiness,' so long as the full salary figures in the calculation of the regular rate and the amount of salary remaining after such reductions

supports an average hourly rate at least equal to the applicable minimum wage.").

In addition, deductions for willful absences or tardiness do not run afoul of the guidelines governing the FWW method. The central feature of the FWW method is that the fixed salary is "straight time pay for whatever hours [the employee] is called upon to work in a workweek." 29 C.F.R. § 778.114(a). This does not mean, however, that the employer must pay the full salary even though the employee decides not to work all the hours that he is called upon to work. To hold otherwise would allow for a tremendous abuse of the FWW method by employees. Beyond Interpretive Letter No. 479, which the Court finds unpersuasive in light of later pronouncements by the DOL, the Plaintiffs provides no support for its argument that deductions for willful absences is not allowed under the FWW method.

The Plaintiffs further argue that even if "occasional deductions" are permitted, the deductions made by Apollo were improper because they were made without adequate investigation or when the employee was not actually wilfully absent or tardy. Again, the Court finds no basis to reverse the district court's careful findings of fact on this issue. In each instance, it found that the employee in question had been wilfully absent, that Apollo had adequately investigated the circumstances surrounding the employee's absence, and that Apollo was justified in making the deductions. These conclusions were made in large part based on the district court's assessment of the credibility of the witnesses and the Plaintiffs. In fact, the court emphasized that the testimony of the Plaintiffs appeared contrived, orchestrated, and wholly unbelievable. As such, we give the determination even greater deference. Nothing in the record indicates that these findings were clearly erroneous.

III. Are the Plaintiffs entitled to attorney's fees, penalties, or liquidated damages under either federal or Louisiana state law?

Even though they were unsuccessful on all of their claims, the Plaintiffs contend that they should be awarded attorney's fees, penalties, and liquidated damages under federal and state law. Their argument is predicated on the fact that Apollo tendered checks totaling $487.89 to five of the Plaintiffs midway through the trial. Ostensibly, these checks were payment for hours worked by the employees, but which the Plaintiffs claimed Apollo failed to credit. The Plaintiffs argue that these payments amount to an admission of liability on those claims for backpay. As a result of this implied admission, Plaintiffs contend that they are due attorney's fees, penalties, and liquidated damages under federal and Louisiana state law. The Court disagrees.

The trial record and relevant case law clearly indicate that Apollo's payments did not constitute any admission of liability. The record makes clear that Apollo tendered payment in order to avoid an additional day and a half of trial that would have been needed to adjudicate the claims for uncredited overtime hours. In making the payments, Apollo made clear that the payments were not an admission of any liability or waiver of any defenses. The Plaintiffs likewise stipulated that their receipt and acceptance of the payments did not in any way dispose of or otherwise decide the merits of their claims for the uncredited overtime hours. Clearly, both parties agreed that Apollo's payment in no way determined the merits of the Plaintiffs' claim.

The Court finds no reason to disregard the express stipulation and agreement of the parties and to now infer an admission of liability on the part of Apollo. *McCloskey v.*

Eckart, 164 F.2d 257, 259 (5th Cir.1947) (refusing to infer that overtime wages were owed by the employer from the fact that the employer made a compromise settlement payment on this claim but expressly stipulated that payment was not an admission of liability). The district court found for Apollo on all of the Plaintiffs' claims. It found that Apollo did not violate the FLSA, Louisiana law or general contract law either by using the FWW method or in its administration of it. Without any admission of liability from Apollo, the Plaintiffs' arguments for attorneys fees, liquidated damages, and penalties quickly lose all merit.

A. Attorney's fees

Despite their failure to prevail on any of its claims, the Plaintiffs assert that because they were forced to file suit before Apollo made payment for uncredited time, an award of attorney's fees is appropriate under 29 U.S.C. § 216(b) and La.Rev.Stat. Ann. § 23:632. However, this contention misapplies both of these statutes. First, 29 U.S.C. § 216(b) allows an award of attorney's fees only "in addition to any judgment awarded to the plaintiff." Here, attorney's fees are not available because the Plaintiffs failed to prevail on any of their claims. Similarly, under § 23:632, an award of reasonable attorney's fees is mandatory when an employee brings a "well-founded" suit for unpaid wages. A suit is "well-founded" only if the employee receives a judgment in his favor. *See Hebert v. Insurance Ctr. Inc.*, 706 So.2d 1007, 1014 (La.App. 3rd Cir.1998); *Loup v. Louisiana State Sch. for the Deaf*, 729 So.2d 689, 694 (La.App. 1st Cir.1999) ("Suits in which the recovery of back wages is *granted* are considered 'well-founded.' ") (emphasis added); *Byrnes v. Orkin Exterminating Co.*, 562 F.Supp. 892, 894 (E.D.La.1983)

("Because no wages have been found to be due, this claim cannot be considered a 'well-founded' suit."). Clearly, under Louisiana law, Plaintiffs are not entitled to attorney's fees under § 23:632 since they did not bring a "well-founded" suit as evidenced by their failure to prevail on any of their claims.

B. Liquidated Damages

If it is found that the employer failed to properly pay wages to its employees, the employer may be liable for liquidated damages in an amount equal to the amount of unpaid wages. 29 U.S.C. § 216(b). An employer may still avoid liquidated damages if the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not acting in violation of the FLA. 29 U.S.C. § 260. It is within the sound discretion of the trial court whether or not to award liquidated damages in the event of a good faith showing by the employer. 29 U.S.C. § 260. Plaintiffs fail to show that the trial court abused its discretion in not awarding them liquidated damages.

First, the trial court ruled that Apollo did not violate either the FLSA, Louisiana law or general contract law. Plaintiffs failed to make the predicate showing that Apollo failed to properly pay wages to the Plaintiffs. Even if this Court assumes *arguendo* that Apollo violated the FLA., the district court found that Apollo was acting in good faith and, in its discretion, decided not to impose liquidated damages. The record supports a finding that Apollo had reasonable grounds to believe that it was complying with the FLSA. For instance, unlike the cases cited on by the Plaintiffs where liquidated damages were found warranted because the employer failed to change its policy after it became aware of its violations, Apollo took affirmative steps to comply with the FLSA. It consulted

with the DOL, specifically with Don Strobel, the Assistant Director for the DOL, to devise a salary scheme that would comply to all the relevant provisions of the FLSA. It was after this consultation that Apollo implemented the FWW method. The trial judge made the expressed determination that Apollo made every reasonable effort to comply with the overtime requirements of the FLA. The DOL investigations cited by Plaintiffs never led to an actual finding of a violation of the FLA. Rather, the investigations only led to a letter being sent to Apollo's employees informing them that they might have a claim for back wages. Given the evidence on the record, the Plaintiffs fail to show that the trial court was clearly erroneous in deciding not awarding liquidated damages. *See Lee v. Coahoma County, Miss.*, 937 F.2d 220, 226-27 (5th Cir.1991)("If the district court finds that employer's action which violated the FLSA was taken in good faith, which good faith was supported by reasonable grounds for believing that the actions complied with the FLSA, it may choose not to award liquidated damages.").

C. Penalty Wages

In order to recover penalty wages under La.Rev.Stat. Ann. § 23:632, the employee must prove (1) that wages were due and owing, (2) that a demand for payment was made at the place where the employee is usually paid, and (3) that the employer failed or refused to pay after the employee's demand. *Hughes v. Cooter Brown's Tavern, Inc.*, 591 So.2d 1334, 1337 (La.App. 4th Cir.1991). Because it is a penal statute, section 23:632 is strictly construed. *Id.* Plaintiffs are not entitled to penalty wages because they failed to make the requisite showing under § 23:632. As noted above, Plaintiffs never established that back wages were owed to them by Apollo and

such proof cannot be implied from Apollo's tender of payments to some of the Plaintiffs.

IV. Motion in Limine

The Plaintiffs' final argument on appeal is that the district court erred in excluding from trial impeachment evidence. Specifically, the Plaintiffs sought to introduce evidence regarding alleged environmental violations by Apollo, improper tax deductions made by Apollo and its owners, and Apollo's violation of local building codes. None of these alleged incidents led to any formal conviction. Plaintiffs claim that the excluded evidence would have called the credibility of several of Apollo's witnesses into question. This Court reviews a trial court's evidentiary rulings for abuse of discretion. *Townsend*, 31 F.3d at 267. Fed.R.Evid. 608(b) states:

> Specific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided by rule 609, may not be proved by extrinsic evidence.

By its language, Rule 608(b) clearly prevents the Plaintiffs from presenting evidence of specific instances of untruthful conduct by certain Apollo witness to show that these witnesses had a propensity for untruthfulness. 28 Charles Alan Wright & Victor James Gold, Federal Practice And Procedure § 6117 (1993) (recognizing that under the proper application of Rule 608(b) extrinsic evidence of specific instances of bad conduct is made inadmissible when offered to prove a witness's character for untruthfulness). In addition, Fed.R.Evid. 403 allows the district court to exclude relevant evidence if "its

probative value is substantially outweighed ... by considerations of undue delay [or] waster of time." Here, the district court found that the evidence had little probative value to the issue of the witnesses' credibility and virtually no relevance to the material issues in the case. In addition, proof of these collateral issues would have likely required many additional days of testimony without shedding any light on the central issue of the case--Apollo's use of the FWW method. In light of Rules 403 and 608(b), even if the evidence that Plaintiffs wished to introduce may have been relevant in determining the credibility of Apollo's witnesses, the district court's decision to exclude the evidence did not amount to "manifest error" so as to constitute an abuse of discretion. *United States v. Williams*, 822 F.2d 512, 517 (5th Cir.1987) ("The district court may under Rule 608(b) determine if evidence is probative of truthfulness, and under 403 exclude even probative evidence if the prejudicial effect outweighs the probative value."); *cf. United States v. Miller*, 91 F.3d 1160,1163 (8th Cir.1996) (affirming district court's ruling to exclude evidence that witness alleged bribed police officer, which was unrelated to the charged offense).

CONCLUSION

Consolidated with this appeal are several appeals and motions. In light of the consolidation of the appeals and the Court's above opinion, Appellants' appeals of the district court's rulings on the motion in limine and on the motion for partial summary judgment along with Appellee's Motion to Dismiss these two appeals are DENIED as moot. In addition, Appellants' motion for attorney's fees and sanctions is DENIED.

For the above stated reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed March 20, 2001]

Nos. 99-30304, 99-30306 and 99-30407

George C. SAMSON, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants

v.

APOLLO RESOURCES, INC., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

****

Lester D. Weaver; Crawford R. Norton,
Plaintiffs-Appellants

v.

Apollo Resources, Inc., doing business as Apollo Services, Inc.,
Defendant-Appellee

****

George C. Samson, III, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants

v.

Apollo Resources Inc., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

Appeal from the United States District Court for the
Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING

Before KING, Chief Judge, and PARKER, Circuit Judge, and GURGESON, District Judge *

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/
Carolyn Dineen King
United States Circuit Judge

* District Judge of the Western District of Texas, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Judgment Entered April 28, 1999]

George C. Samson, III, et al *Plaintiffs*	Civil Action No.: 97-1053
v.	
Apollo Resources, Inc., d/b/a Apollo Services, Inc. et al. *Defendants*	Judge Haik Magistrate Judge Methvin

JUDGMENT

This matter was tried before the Court as a bench trial beginning on March 1, 1999 and ending on March 9, 1999. Present at trial were:

William L. Melancon on behalf of the Plaintiffs and

Timothy J. McNamara and Steven C. Lanza on behalf of the Defendants, Apollo Resources, Inc., d/b/a Apollo Services, Inc. ("Apollo"), Jeffrey A. Reddoch, and Chiquita Reddoch.

At the commencement of trial there were twenty-six (26) plaintiffs, however, on March 5, 1999 the parties jointly stipulated that the case would be severed after the completion of all the testimony and evidence of the Plaintiffs thus far, staying all further proceedings in this case and in case number

98cv2103. Therefore, the only claims before the Court were those of plaintiffs George C. Samson, III, Kevin D. Smith, Melvin K. Smith, Norman J. Landry, Brent C. Manuel and Jackie D. Hays ("the Plaintiffs"). At the close of the Plaintiffs' evidence on March 9, 1999, the Defendants moved for Judgment as a Matter of Law pursuant to Rule 52(c) of the Federal Rules of Civil Procedure as to all claims presented by these six (6) plaintiffs.

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants are entitled to a Judgment as a Matter of Law pursuant to Rule 52(c) and all of the Plaintiffs claims are hereby DISMISSED, with prejudice. For the reasons behind the Judgment see the Courts oral reasons given on March 9, 1999 as well as the written additional Reasons for Judgment signed on April 27, 1999.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the [sic] all further proceedings in civil actions numbered 97cv1053 and 98cv2103 are STAYED.

THUS DONE AND SIGNED, this 27th day of April, 1999, in Lafayette, Louisiana.

/s/ _____
Richard T. Haik
United States District
Judge

Judgment entered: 4/28/99

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Judgment Entered April 28, 1999]

George C. Samson, III, et al *Plaintiffs*	Civil Action No.: 97-1053
v.	
Apollo Resources, Inc., d/b/a Apollo Services, Inc. et al. *Defendants*	Judge Haik Magistrate Judge Methvin

ADDITIONAL REASONS FOR JUDGMENT

This matter was tried before the Court as a bench trial beginning on March 1, 1999 and ending on March 9, 1999. Present at trial were William L. Melancon on behalf of the Plaintiffs, and Timothy J. McNamara and Steven C. Lanza on behalf of the Defendants, Apollo Resources Inc. d/b/a Apollo Services, Inc. ("Apollo"), Jeffrey A. Reddoch, and Chiquita Reddoch.

Plaintiffs brought suit against Apollo and the Reddochs under the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.) ("FLSA"), the Louisiana Wage Statute (La. R.S. 23:631 and 632) and general employment contract damages. At the commencement of trial there were twenty-six (26) plaintiffs, however, on March 5, 1999 the parties jointly stipulated that the case would be severed after the completion of all the testimony and evidence of the Plaintiffs thus far, staying all further proceedings in this case and in case number 98cv2103. Therefore, the only claims before the Court were those of

plaintiffs George C. Samson, III, Kevin D. Smith, Melvin K. Smith, Norman J. Landry, Brent C. Manuel and Jackie D. Hays ("the Plaintiffs").

On March 9, 1999, at the close of the Plaintiffs' evidence, the Defendants moved for Judgment as a Matter of Law pursuant to Rule 52(c) of the Federal Rules of Civil Procedure as to all claims presented by these six (6) plaintiffs. This Court granted the Rule 52(c) motion in favor of all Defendants and orally issued findings of fact and conclusions of law in open court, reserving the right to issue additional reasons if the Court felt it was necessary. This Court ruled that the Defendants in no way violated the Fair Labor Standards Act, the Louisiana Wage Statute or any general contract law. Due to the complexity of the issues presented in this case the Court has decided to issue additional reasons as to the conclusions of law only. These additional reasons are merely a detailed analysis of the basis of the Courts oral conclusions of law.

I. FACTS

All of the Plaintiffs involved in this suit were at one time employed by Apollo and being paid under a fluctuation workweek or "sliding-scale" method. Apollo paid its employees a monthly wage plus a weekly overtime premium for each hour worked over forty (40). Apollo's overtime premium is calculated by multiplying the monthly wage amount by 4.3 to get the weekly wage. The weekly wage is then divided by the actual number of hours worked by that employee that particular week to come up with the regular rate at which the employee is employed. One-half (½) of the regular rate is equal to the overtime premium rate. The overtime premium rate is then multiplied by the hours worked over forty in that

workweek to determine the total overtime premium due. In other words, Apollo paid its employees a fixed salary for all hours worked in any workweek plus one-half times (instead of one and one-half times) the regular rate of pay for all hours worked over forty.

Apollo did not create this method of payment out of thin air. In 1991, defendant Jeff Reddoch, President of Apollo, contacted the Wage and Hour Division of the Department of Labor ("DOL") to obtain assistance in implementing a pay plan which would both fit the needs of Apollo and comply with the FLSA. Don Stroble, the Assistant District Director of the Wage and Hour Division of the DOL in 1991, testified that he sent the Defendants materials explaining the Fluctuating Workweek or "Sliding-Scale" Method ("FWWM"), and provided assistance to Mr. Reddoch in implementing the FWWM.

One policy that Mr. Stroble helped the Defendants implement was Apollo's policy of taking deductions for occasional willful absences or tardies. Apollo deducted from an employees pay in workweeks where the employee was willfully not available for work, however, these deductions were only taken where the employee had not yet worked forty hours for that workweek. According to the testimony of Mr. Reddoch, deductions were only taken for occasional willful absences or tardies. Apollo did not take any deductions where they believed the employee was absent due to illness or other uncontrollable incidents. Mr. Reddoch and Johnnie Daughdrill, Apollo's operations manager, testified that Apollo required Dr. [sic] excuses from an employee when he was suspected of "playing hookey" from work. Mr. Daughdrill testified that if an employee called in sick to the answering service without talking to or asking to talk to a supervisor a red flag would be raised. Mr. Daughdrill stated that he would then make one or two attempts to contact the employee personally over the telephone,

if that failed then upon that employee's return to work he would ask the employee to get a Dr. [sic] excuse. If no Dr. [sic] excuse was ever provided Apollo would then deduct for the number of hours absent or tardied.

The Plaintiffs have made the following contentions in the case at hand: (1) that the Fluctuation Workweek Method ("FWWM") violates a fundamental tenet of the FLSA in that it does not discourage an employer from working employees past forty hours per week; (2) that Apollo could not use the FWWM because the Plaintiffs did not work "irregular hours" as defined by the Fifth Circuit in *Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653, 658 (5th Cir. 1967), cert. denied, 390 U.S. 946, 88 S.Ct. 1031, 19 L.Ed.2d 1134 (1968); (3) that the FWWM could not be used if the hours worked in a week exceed sixty; (4) that Apollo did not satisfy the "clear and mutual understanding" requirement of 29 CFR § 778.114 which governs the FWWM; (5) that Apollo made deductions from several employees pay in derogation of the rules governing the FWWM and La. R.S. 23:632; and (6) that the Plaintiffs' are also entitled to recover penalty damages for unpaid wages for each day that Apollo withholds payment in an amount not to exceed ninety days wages, under La. R.S. 23:632.

II. ANALYSIS

A. Purpose of the FLSA

The Plaintiffs' first contention is that the FWWM itself is a violation of the purpose of the FLSA. Specifically, that the FWWM does not discourage an employer from working employees past forty hours per week. Essentially the issue presented by the Plaintiffs is whether or not the FWWM as defined in 29 CFR § 778.114 violates the FLSA. This Court holds that the FWWM as defined in 29 CFR §778.114 does not

violate the FLSA. To appreciate the Courts opinion one must examine the purpose of the FLSA as well as the origin of the FWWM as defined in §778.114.

In 1938, Congress passed the FLSA. 29 U.S.C. §§201 et seq. The FI SA provides that no employer shall employ any employee: (1) at a rate less than minimum wage, nor (2) at a rate less than one and one-half times the "regular rate at which the employee is employed" for hours worked over forty in a particular week. 29 U.S.C. §§206 and 207. Since the enactment of the FLSA the Supreme Court on several occasions has addressed the validity of different pay plans that were in existence prior to the FLSA. In 1942, two such pay plans were approved by the Supreme Court in *Overnight Motor Transp., Co., Inc. v. Missel*, 316 U.S. 527, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) and *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942). In *Overnight Motor*, the Court approved what is now 29 CFR §778.114 and is recognized as the FWWM or the "sliding-scale" method. In *Belo*, the Court approved what is now memorialized in 29 U.S.C. §207(f) and commonly referred to as the "Belo" plan ("Belo").

In *Overnight Motor*, the employees in question worked an average of sixty-five hours a week, and the hours worked fluctuated from week to week. Regardless of the actual hours worked the employees were paid a set weekly salary. The Court recognized that Congress did not specifically address other methods of paying wages except by an hourly rate. In fact, the Act does not even mention the notion of "fluctuating hours." On the other hand, the Court stated"we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the act. [W]here the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week." *Id.* at U.S. 479, S.Ct.

1221; see also *U.S. v. Rosenwasser*, 323 U.S. 360, 65 S.Ct. 295, 89 L.Ed. 3d (1944).

While the "regular rate" is the heart of the overtime provision of the FLSA, 29 U.S.C. §207(a), the Act does not explain exactly how it is computed. The *Overnight Motor* Court specifically addressed the computation of the "regular rate" as it pertains to a weekly wage. The "regular rate" was determined on a weekly basis, because as the Supreme Court stated that it is "abundantly clear" from the wording of the Act itself that the unit of time in which an employer is to distinguish regular from overtime pay is the "week". *Id.* at 579. In *Overnight Motor*, the Court held that when computing overtime compensation for employees under contract for a fixed weekly wage with variable or fluctuating hours the weekly wage is divided by the actual hours worked to determine the regular rate, and time and one-half the regular rate for all hours employed beyond forty, equals overtime compensation. *Id.* at 580; see also *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29 (1944).

Under *Overnight Motor*, when an employee is paid a weekly wage the employee receives a "regular rate" for all hours worked in that workweek, whether few or many, including hours worked over forty. Therefore, to comply with the time and one-half overtime provision of the FLSA an employer need only pay the employee an additional overtime premium equivalent to one-half of the "regular rate" multiplied by all of the hours worked over forty, because the employee already received one times the "regular rate" for each hour over forty. This computation has been memorialized by the DOL in 29 CFR §778.114 and the Wage and Hour Division's, Field Operations handbook. Regulation 778.114 reads in pertinent part:

778.114 Fixed salary for fluctuating hours

(a) . . . such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement. (b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for

> overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

Regulation 778.114 has been accepted by a majority of the Circuits, including the Fifth Circuit, and is upheld by this Court today. *Overnight Motor*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988); *Martin v. Tango's Restaurant, Inc*, 969 F.2d 1319 (1st Cir. 1992); *Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784, (1st Cir. 1985) (No. 85-1090); *Anderson v. County of Kershaw*, 1999 WL 55182 (4th Cir. 2/08/99); *Griffin v. Wake County*, 142 F.3d 712 (4th Cir., 4/27/98); *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d 470 (6th Cir. 1987); *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993); *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444 (8th Cir. 1978); *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d (9th Cir. 1982); *Wethington v. City of Montgomery*, 935 F.2d (11th Cir. 1991).

As for the purpose of the FLSA, Congress' findings and policy concerning the creation of the FLSA are contained in Section 202 of the FLSA, which read as follows:

> Congressional finding and declaration of policy
>
> (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers (1) causes commerce and the instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes and unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

29 U.S.C. § 202 (a). As stated by the Supreme Court in *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945), the purpose of the FLSA was to "protect certain groups of the population from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce." See also, *Foremost Dairies, Inc. v. W. Willard Wirtz*, 381 F.2d 653 (5th Cir. 1967), cert. denied, 390 U.S. 946, 88 S.Ct. 1031, 19 L.Ed. 2d 1134 (1968).

In formulating the FLSA Congress may also have intended to discourage an employer from working employees past forty hours per week may. Even so, when enforcing the FLSA courts look not only at Congress' purpose, but more importantly the method Congress chose to achieve that purpose. The method Congress chose to achieve its purpose behind the FLSA is the overtime provision of section 207 (a), This provision may not be perfect, but as the Court stated in *Overnight Motor*, "[overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations." *Id.* at 572.

Since the FWWM complies with the requirements of 207(a) it is therefore in compliance with the policy and purpose of the FLSA. Also, this Court finds that the FWWM provides as much discouragement as the time and one-half method. Under the FWWM employers are still required to pay time and one-half of the "regular rate." In fact, employers using the FWWM must pay a higher salary in weeks where less hours are worked to remain competitive as well as comply with the FLSA.

This Court holds that the Plaintiffs' contention that the FWWM as defined in 29 CFR §778.114 violates a fundamental tenet of the FLSA in that it does not discourage an employer from working employees past 40 hours per week is contrary to any existing jurisprudence and regulations and is completely unsupported. The FWWM as defined in 29 CFR 778.114 was created by the Supreme Court's ruling in *Overnight Motor* and has been applied by almost every Circuit in the United States. The Court's holding in *Overnight Motor* has been a rule of decision for almost fifty-one years, and recognized as such on each appropriate occasion. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. Congress has permitted 207 (a) to

stand unmodified and the courts have applied it as so construed, and so shall this Court.

B. Irregular Hours

The Plaintiffs' second contention is that Apollo can not use the FWWM because its employees do not work "irregular hours" as defined by the Fifth Circuit in *Foremost Dairies*, 381 F.2d 653. In *Foremost Dairies*, the Court stated that hours were not "irregular" as required by 29 U.S.C. §207(f), commonly referred to as the "Belo" plan, unless the employee's hours fluctuate above and below forty hours per week. *Id.* The Plaintiffs argue that since the first sentence of the *Overnight Motor* opinion states that the case involved "an employee working irregular hours for a fixed weekly wage" the "irregular" hour standard of *Foremost Dairies* must be applied to the FWWM.

The Plaintiffs' argument is flawed for several reasons. The most obvious reason being the contrary Fifth Circuit jurisprudence. *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976). In *Yadav*, the Court held that, "[t]he appellants' reliance upon the language of section 7(f) of the FLSA, 29 U.S.C.A. § 207(F) (1970), and our opinion in *Foremost Dairies, Inc. v. Wirtz*, . . . is misplaced. The application of the 'fluctuating work week' formula is not at all dependant upon a finding that the employer is entitled to the exception commonly referred to as the 'Belo' provision." *Id.* at 1207; See also *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1999); *Haynes v. True Green Corp.*, 154 Ill. App. 3d 967, 107 Ill. Dec. 792, 507 N.E. 2d 945 (1987). In implementing the FWWM, an employer has never been bound by the requirements of the "Belo" plan.

The Supreme Court itself in *Overnight Motor* and *Belo*, which were decided on the same day, specifically states that the

two pay plans at issue are "entirely unlike" one another. *Belo*, *Id.* at 634; see also *Overnight Motor*, *Id.* at 581. The "Belo" plan was enacted by Congress in a response to the Supreme Courts decisions of *Belo*, *Id.* and *Walling v. Haliburton Oil Well Cementing Co.*, 331 U.S. 17, 67 S.Ct. 1056 (1947). Under the "Belo" plan, an employer first determines an employee's hourly rate and the maximum number of hours in a week that the employee will be guaranteed, always in excess of forty and never more than sixty. The guaranteed pay for each week is determined by multiplying the hourly rate times forty, then multiplying time and one-half the hourly rate by the number of hours guaranteed over forty, and adding the two together. Thus, the "Belo" method is salary which includes hourly pay for the first forty hours and a pay for predicted overtime hours at a rate of one and one-half times the regular rate of pay. The employee is paid the guaranteed salary no matter how many hours worked in a particular week. The guaranteed salary cannot cover more than sixty hours, and the employee must be paid an additional one and one-half times the regular rate of pay for all hours worked over the guaranteed hours. See 29 U.S.C. § 207(f); *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206; *Condo v. Sysco Corp.*, 1 F.3d 599. This method of pay is different from the FWWM where the employee is paid a salary for all hours worked in a week plus an overtime premium of one-half the "regular rate" for all hours over forty. The Plaintiffs' have failed to cite and this Court is unaware of any case which applies the "irregular" hour requirement of the "Belo" plan to the FWWM.

In addition, while the Court in *Overnight Motor* does not mention "irregular" in the first sentence, that is one of only two times the phrase is mentioned in the case. Even 29 CFR §778.114 which outlines the requirements of the FWWM uses the terms fluctuating and variable to describe hours instead of

"irregular." Also, in 1981, the Administrator of the Wage and Hour Division of the DOL added subsection (b) to §778.114 which provides an illustration on how to calculate the regular rate under the FWWM. 46 FR 7310, Jan. 23, 1981. The illustration computes the regular rate of an employee who in the course of four weeks worked 40, 44, 50 and 48 hours. None of the weeks in the illustration are "irregular." That is evidence that the DOL does not believe the hours must be "irregular" to use the FWWM.

This Court finds that the "Belo" plan and the FWWM are wholly different and unrelated methods of payment, and, therefore, the Plaintiffs' contention that "irregular" hours is a requirement of the FWWM is unfounded and hereby rejected. We will not apply the "irregular" hours requirement of the "Belo" plan to the FWWM. Since the Supreme Court approval of the FWWM in *Overnight Motor* neither the courts nor the DOL have deemed it necessary to apply the "irregular" hours requirement to the FWWM and neither does this Court.

C. Sixty Hour Limitation

The Plaintiffs' third contention is that the FWWM can not be used if the hours worked in a week exceed sixty. The Plaintiff's [sic] assert that 29 CFR §778.114(c) explicitly prohibits an employer from using the FWWM to calculate overtime if the employee works so many hours that his pay rate for overtime hours is no greater than the pay rate he would have received if he worked no overtime hours. The Plaintiffs' then contend that this threshold is crossed at sixty hours. In actuality, Plaintiffs' argument is that the Court must compare the regular rate of pay at forty hours per week with the overtime rate of pay at sixty hours per week, and if the overtime rate at sixty hours per week is less that the regular rate of pay at forty hours per week then the FWWM cannot be used. For example,

if an employee is paid a weekly salary of $600.00, his regular rate of pay for a forty hour workweek is $15.00 per hour (600 divided by 40=15). If the same employee works sixty hours in a particular week his regular rate of pay is $10.00 per hour (600 divided by 60=10) and his overtime rate is $15.00 per hour (10 times one and one-half). In any week that the employee works over sixty hours a week his overtime rate of pay will be less than $15.00 per hour.

The Plaintiffs' argument is centered around the final sentence of 29 CFR §778.114(c). This sentence provides:

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

It is apparent that the Plaintiffs' argument is based on a misinterpretation of the regulations. As stated before, it is "abundantly clear" from the wording of the FLSA that the unit of time in which an employer is to distinguish regular from overtime is the "week." *Overnight Motor*, 316 U.S. at 579, 62 S.Ct. at 1221; 29 U.S.C. §201 et. seq. Even 29 CFR §778.114 expressly states that the regular rate of pay (or nonovertime hours rate) varies from week to week because it is determined by dividing all hours worked in a workweek into the salary for that workweek. Therefore, in order to prevail the Plaintiffs' must prove that they were paid the same rate for nonovertime and overtime hours in the same workweek. The Plaintiffs' cannot compare the nonovertime rate for a forty hour workweek with an overtime rate in a sixty hour or more workweek, because they are two different workweeks.

The Plaintiffs' argument misses the purpose of the last sentence of 29 CFR §778.114. In *Cash v. Conn Appliances, Inc.*, 2 F.Supp 2d 884 (E.D. Tx. 1997), the court explained that this sentence was included to prevent the practice of "cutting salary for a week or weeks in which less than forty hours is worked to counterbalance compensation for hours over forty worked in another week of the same pay period." *Id.* at 895 n.24. For example, assume an employee works fifty hours in one workweek and thirty hours in the next. Instead of paying the employee an overtime premium for the ten overtime hours worked in the first fifty hour workweek, the employer applies the ten overtime hours to the second workweek of thirty hours and pays the employee for forty straight time hours per workweek. As a result, in the second workweek the employee would receive a regular rate for the thirty nonovertime hours as well as the ten overtime hours worked in the first week. Under that practice, the employee would receive no greater pay for his overtime hours than his nonovertime hours. The last sentence of 29 CFR §778.114 was intended to prohibit that type of payment scheme not to create a sixty hour limitation to the FWWM.

Also, the Plaintiffs' seem to imply that some type of limitation is required, because the longer an employee works the less his regular rate of pay will be per hour. Congress has provided limitations; 1) an employee may not be paid at a rate less than the minimum wage and 2) and employee must be paid one and one-half times the "regular rate" for each hour worked over forty. 29 U.S.C. §§ 206, 207. However, the fact that an employee makes less the longer he or she works is irrelevant. The Supreme court in *Overnight Motor*, stated, "[i]t is true that the longer the hours the less the rate an the pay per hour. This is not an argument, however, against this [FWWM] method of determining the regular rate of employment for the week in

question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour." *Id.* at 580. In addition, in *Overnight Motor*, the plaintiffs worked an average of sixty-five hours a workweek. *Id.* at 572. Therefore, the Court in *Overnight Motor* was faced with the exact scenario the Plaintiffs claim should be prohibited and the Court did not find that this sixty hour limitation was required.

This Court will not create a sixty hour limitation to the FWWM. The sixty hour limitation in the "Belo" plan, 29 U.S.C. § 207(f), has been in place since 1949 and neither the courts nor the DOL have expressed any intention to apply a sixty hour limitation to the FWWM, as the Plaintiffs' are proposing. Therefore, the Plaintiffs' third contention is also rejected.

D. Clear and Mutual Understanding Requirement

The Plaintiffs' fourth contention is that Apollo did not satisfy the "clear and mutual understanding" requirement of 29 CFR § 778.114. The Plaintiffs' seem to contend that the employee must understand the intricacies of the FWWM as well as have a close approximation of the actual number of hours he will be required to work. At the conclusion of the trial this Court held that Apollo satisfied the "clear and mutual" understanding requirement as to all the Plaintiffs. Because the findings of fact concerning the Plaintiffs' actual understanding of Apollo's pay method and potential hours were orally given by the court they will not be repeated at this time. The following is an analysis of the standard which was used by the Court in concluding that Apollo satisfied the "clear and mutual understanding" requirement.

To use the fluctuating workweek method there must be an understanding between the employer and the employee.

Section 778.114(a) provides:

> Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period,. . . , and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

Reading the regulation literally it requires a clear and mutual understanding between the employer and employee that a salary will be paid as compensation for all hours worked each week and an overtime premium not less than one-half the regular rate will be paid for all hours worked over forty. In *Cash v. Conn Appliances, Inc.*, 2 F.Supp. 2d 884 (E.D. Tex., 1997), the court held that an "employee need only possess a clear understanding 'that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number.'" Citing §778.114(a). The Fifth Circuit has not yet specifically addressed the understanding requirement of the FWWM, however, the Fourth Circuit has on several accessions.

In *Bailey v. County of Georgetown*, 94 F.3d 152 (4th Cir. 1996), the Fourth Circuit stated that neither the regulation nor the FLSA requires that an employee also understand the manner in which their overtime pay is calculated. *Id.* at 156; see also *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998); *Roy v. County of Lexington, S.C.*, 141 F.3d 533 (4th Cir. 1998). Rather, "if it is clear from the employee's actions that he or she understood the payment plan in spite of after-the-fact verbal contentions otherwise," the County has sufficiently

demonstrated a "clear mutual understanding." *Roy v. County of Lexington*, 141 F.3d at 547; quoting *Mayhew v. Wells*, 125 F.3d 216, 219 (4th Cir. 1997). It is enough if the employer "provide[d] its employees with a reasonably clear and accurate explanation of their compensation." *Griffin v. Wake County*, 142 F.3d at 717; quoting *Roy v. County of Lexington*, 928 F.Supp. 1406, 1419, vacated in part on other grounds, 948 F.Supp. 529 (D.S.C. 1996), aff'd, 141 F.3d 533 (4th Cir. 1998).

The Plaintiffs' cite three cases in their pre-trial memorandum where courts have found no clear and mutual understanding between the employees and the employer. (Plaintiffs' Pre-trial Memorandum p.11, ¶ 1) *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379 (9th Cir. 1982); *Yourman v. Dinkins*, 865 F.Supp. 154 (S.D.N.Y. 1994); *Dingwall v. Friedman Fisher Associates*, 3 F.Supp. 2d 215 (N.D.N.Y. 1998). The facts at issue in this case are distinguishable from the facts in *Oliver*. In *Oliver*, the employee was not paid any overtime premium. Aside from being factually distinguishable, the court in *Oliver* did not spell out what was required to meet the understanding requirement. In *Dingwall*, the court citing *Roy v. County of Lexington*, adopted the Fourth Circuit standard for the understanding requirement. *Id.* In *Yourman*, the court does not once mention the understanding requirement. *Id.* Hence, this Court finds the Plaintiffs' supporting cases to be irrelevant and not controlling.

This Court acknowledges that the FLSA was enacted to protect those employee who lack the bargaining power, i.e. blue-collar workers. However, the FLSA does not dictate that employers subjectively determine whether each and every employee is capable of and actually does understand the intricacies of their method of pay. Therefore, this Court adopts the Fourth Circuits standard for the understanding requirement, and holds that employers must provide their employees with a

reasonably clear and accurate explanation that their compensation will include a fixed salary, which will cover all hours worked in any workweek, as well as an additional overtime premium, which will not be less than one-half their regular rate for that particular workweek.

E. Improper Deductions

The Plaintiffs' fifth contention is that Apollo made deductions from several employees pay in derogation of the rules governing the FWWM. This Court rejects this argument also. The Plaintiff's contend that an employer cannot make deductions for any reason when the employee does any work during the workweek. Citing, Wage & Hour Opinion Letter No. 479, May 18, 1966; *Yourman v. Dinkins*, 865 F.Supp. 154 (S.D.N.Y. 1994); *Aiken v. County of Hampton, South Carolina*, 977 F.Supp. 390, 395 (D.S.C. 1997); *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); *Local 539 Gary Firefighters v. City of Gary, Indiana*, 1995 WL 934175, p. *9 (N.D. Ind.), citing *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 286 (7th Cir. 1994).

While the Plaintiffs' correctly cite the 1966 DOL opinion letter they completely ignore the two subsequent opinion letters and the Wage and Hour Division's Field Operations Handbook which overrule the 1966 letter. In its subsequent opinion letters and Field Operations handbook the DOL has clearly stated that employees using the FWWM May take occasional deductions for disciplinary reasons related to voluntary of willful absences of tardiness. Wage and Hour Division's Field Operations Handbook, ¶32b04b; DOL, Wage and Hour Opinion Letter, May 26, 1982; DOL, Wage and Hour Opinion letter No. 988, 1969-73, Wages & Hours (CCH) ¶30,531 (May 1, 1069) [sic]. This court recognizes that interpretations promulgated by the Wage and Hour division of

the DOL are not binding. However, the Administrator's policies and standards are entitled to great weight and respect. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1949). This Court finds that an employer using the FWWM may take deductions from an employees salary where the employee absents himself from work for personal reasons, other than sickness or an accident.

All of the cases cited by the Plaintiffs' discuss the deduction rules regarding employees employed in a bona fide executive capacity. 29 CFR 541.118; see 29 U.S.C. §213(a)(4). The courts in *Local 539 Gary Firefighters and Klein* attempt to apply the deduction rules of 29 CFR § 541.118 to the FWWM. Under 29 U.S.C. §213(a)(4), employees "employed in a bona fide executive, administrative, or professional capacity" are not covered by the FLSA. One of the requirements to obtain the exempt status under §213(a)(1) is that the employee must be paid a specified minimum amount on a "salary basis." *Auer v. Robbins*, 147 S.Ct. at 908; 29 CFR §§ 541.1(f), 541.2(e), 541.3(e). The rules regarding which deductions can be taken from the salary of a [sic] exempt employee does not apply to the deductions that can be taken from the salary of non-exempt employees paid under the FWWM. *Cash v. Conn Appliances, Inc.*, 2 F.Supp. 884 (E.D.Tex 1992).

Even if this Court were to apply 29 CFR §541.118 to the FWWM by analogy the same conclusion would be reached. The regulation requires that to be paid on a "salary basis" an employee's compensation cannot be subject to reduction because of variations in the "quality or quantity of the work performed." However, the regulation goes on the carve out an exception from this rule by stating, "[d]eductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or

accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences." 29 CFR §541.118(a)(2). This Court asserts that even under the bona fide executive provision the deductions taken by Apollo were permissible.

The Plaintiffs also claim that Louisiana law prohibits deductions made from the salary of employees paid under the FWWM. Louisiana Revised Statute 23:635 provides that "[n]o person . . . shall assess any fines against his employees or deduct any sum as fines from their wages." "Fines" within the meaning to La. R.S. 23:635 are pecuniary penalties imposed for violation of some rule, or regulation. *Georesearch, Inc. v. Morriss*, 193 F.Supp. 163 (W.D.La. 1961); *Cupp v. Banks*, 25,762 (La. App. 2 Cir. 5/4/94), 637 So.2d 678 (La.App. 2 Cir. 1994); *Brown v. Navarre Chevrolet, Inc.*, 610 So.2d 165 (La.App. 3 Cir. 1992); *Glover v. Diving Services Intern., Inc.*, 577 So.2d 1103 (La.App. 1 Cir. 1991). Clearly the fact that Apollo referred to these deductions as disciplinary does not per se make them "fines" within the meaning of La. R.S. 23:635. Apollo deducted from an employees weekly salary when the employee willfully absenced himself from work. Neither jurisprudence nor logic supports an interpretation of La. R.S. 23:635 which would prohibit employers from deducting from the salaries of employees who do not show up for work. Therefore, this Court finds that the deductions taken by Apollo are not "fines" within the meaning of La.R.S. 23:635, and are not prohibited by Louisiana Law.

F. Preemption of Louisiana Law Claims by the FLSA

The Plaintiffs' final contention is that they are entitled to recover penalty damages and attorney's fees for unpaid wages for each day that Apollo withholds payment in an

amount not to exceed ninety days wages, under La. R.S. 23:632. It is not necessary for this Court to determine whether the FLSA preempts La. R.S. 23:632, because this Court found that no back wages were due. The Court found that no back wages were due for overtime, bonuses nor uncredited hours. Even though the Defendants' asserted that the issue of uncredited hours was moot, because the Plaintiffs' counsel was given checks during the trial for all alleged uncredited hours, this Court still ruled that only one of the Plaintiffs proved that they were entitled to any hours which they allege where not credited. In reference to the one plaintiff, Brent Manuel, the Court found that he may have been entitled to one or two hours. Such an award would be so de minimis that the court will not order penalties or attorney's fees. This Court is of the opinion that the Defendants were never told, prior to trial, exactly how many hours the Plaintiffs' were owed and for what reason they were owed. In fact, throughout the trial even the actual number of uncredited hours alleged changed from day to day. Any award of penalties and attorneys fees in this case would be unjust and an abuse of the Louisiana Wage Statute.

III. CONCLUSION

This Court holds that the Defendants did not violate either the Fair Labor Standards Act, the Louisiana Wage State or any general contract law. While the spirit of the FLSA is to be considered each time a court interprets the Act, we are not at liberty to go outside the guidelines established by Congress to enforce the Act. The overtime provision of section 207(a) may not solve all the problems of the blue-collar worker, but it is what Congress selected to protect them. In accordance with well settled jurisprudence, this Court holds that the FWWM, as it is defined in 29 CFR §778.114, complies with section 207(a)

of the FLSA. Also, this Court found that the pay plan implemented at Apollo complied with the requirements of 29 CFR § 778.114. Therefore, the pay plan employed by the Defendants in no way violates the FLSA, the Louisiana Wage Statute or any general contract law.

THUS DONE AND SIGNED this 27th day of April, 1999 at Lafayette, Louisiana.

/s/ _____

Richard T. Haik
United States District Judge

Judgment Entered: 4/28/99

APPENDIX E

Opinion Letter of Wage-Hour Administrator.
Opinion Letter No. 479
May 18, 1966

Fair Labor Standards Act

This is in further reference to your letter concerning the application of the maximum hours and overtime compensation provisions of the Fair Labor Standards Act to your client's proposed method of compensation.

You state that your client intends to employ certain supervisory personnel to whom he will pay a fixed salary for variable hours of work in a workweek. These employees will generally work alternating workweeks of 43 and 51 hours. However, for one month before Christmas and Easter of each year the employees will work 6 days every week and during about six other workweeks in the year the employees will be expected to work an extra night of from 3 to 4 hours. You further state that for a 43 hour workweek your client would pay the employee his agreed upon salary plus 3 times one-half the hourly rate computed by dividing the weekly salary by 43 and for a workweek of 51 hours the employee would receive his agreed upon salary plus 11 times one-half the hourly rate computed by dividing the salary by 51 hours. Your client believes that such a method of payment meets the requirements of section 778.114 of Interpretative Bulletin, Part 778, and you request an advisory opinion thereon.

While the illustration you give concerning the 43 and 51 hours workweeks seem to meet the requirements of section 778.114, we cannot tell with any certainty how your client's employees would be paid when they work less or more hours than those in a workweek. Generally speaking, the fluctuating workweek method of computing and paying overtime

compensation is utilized in connection with employees who work a varying or irregular number of hours in a workweek. The fundamental characteristic of the method is that the employee receives the full amount of his fixed salary as straight time pay every week, regardless of the number of hours or days worked in the workweek, so long as the employee performs any work during the workweek. Deductions for absences of less than a week, whether for illness, personal business, or other reasons, may not be made under this method of compensation.

Also, a salary will not be considered payment for a workweek of varying hours, for the purpose of the Act, unless all the facts demonstrate that this is so, and it is clearly understood and agreed upon by the employee and employer. There must be a clear agreement that the salary is straight time compensation for whatever hours are worked in the workweek, with no possibility that it is earned in the first 40 hours of work or other fixed period. When a salary is paid for a fluctuating workweek it must not only in fact assure that no workweek will be worked in which the salary fails to provide at least the current statutory minimum hourly rate of $1.25, but the salary must also be so arranged that it is reasonably calculated to provide for such a statutory minimum.

Since the employees your client is concerned with are to be supervisory employees the possibility exists that the exemption provided in section 13(a)(1) of the Act, as defined in Regulations, Part 541, may be applicable to their employment. If that is the case, neither the minimum wage nor the maximum hours and overtime compensation provisions of the Act would be applicable.

APPENDIX F

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 26, 1982
(received June 6, 1982)

This is in reply to your letter in which you request an opinion regarding a fixed salary for fluctuating hours method of computing overtime compensation.

As discussed in 29 CFR Section 778.114, the "fluctuating workweek" method may not be utilized unless the salary is sufficient to provide for compensation at a rate not less than the applicable minimum wage for every hour worked in those workweeks in which the number of hours is the greatest. It has been our position that use of this plan is invalid where an employer can reasonably anticipate that employees will be required to work so many hours that the guaranteed salary would be insufficient to provide the minimum wage for each hour worked. (See enclosed WH Opinion Letter dated February 6, 1969.) However, in the case of an emergency or unforeseen situation which occasions such excess hours in any workweek, we would permit the employer to pay the applicable minimum wage for the first forty hours and one and one-half times such minimum wage for all hours worked over 40 without invalidating the "fluctuating workweek" plan.

Since the fundamental characteristic of the fluctuating workweek method of compensation is that the employee receives the fixed salary as straight time compensation for the week, regardless of the number of hours or days worked, if this

method of payment is adopted, an employer is obligated to pay the salary in full as long as the employee performs any work during the workweek.

There are two exceptions to this rule: disciplinary deductions and initial and terminal weeks of employment. Occasional deductions may be made as a disciplinary measure for willful absence or tardiness, but they may not cut into the minimum wage or overtime pay required by the Act. Similarly, an employee employed on a fixed salary basis for irregular hours of work may be paid a pro rata share of his/her salary in the initial or terminal week of employment, when he/she is not in payroll status for the entire week.

Generally, an employer who utilizes this plan may not make deductions for absences of less than a week due to illness, unless there is an employer-furnished sick pay plan which provides independent compensation for such absences. Under such a plan (whether in the form of a wage-continuation insurance policy or a sick-leave policy) the employee must receive total compensation equaling at least his/her regular salary for the workweek.

With respect to your method of computing overtime premiums on monthly commissions or bonuses, our calculations indicate that although the mathematical steps you take differ from those outlined in 29 CFR Section 778.120, the resulting amount of premium pay is practically the same. Therefore, your method of averaging workweeks and multiplying the coefficient (for the average workweek) by the commission or bonus amount is acceptable as long as the employer clearly understands that no workweeks of less than 40 hours may be used in calculating the average workweek.

We also wish to point out that, contrary to the information contained in the next to the last paragraph on page 3 of your enclosure, it is the employer and not the employee who is responsible for maintaining an accurate record of hours worked and all other records required by 29 CFR Section 516.

We trust this is responsive to your inquiry.

Sincerely,

/s/_____
William M. Otter
Administrator

Enclosure

APPENDIX G

1997 WL 998050

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
December 24, 1997

***

This is in response to your letter to Secretary Herman regarding overtime compensation under the Fair Labor Standards Act (FLSA). You ask four specific questions, which will be answered in the order asked.

Question 1: If an employee paid a fixed salary for fluctuating hours (fluctuating workweek method) needs sick/personal or vacation time, can they be required to use vacation/sick for days missed and also can they be docked under this program for partial or full days once they use all available benefits?

Answer 1: Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114 of C.F.R. Part 778 (copy enclosed), one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted. However, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying

overtime need not be paid his/her full salary in any workweek when he/she performs no work.

Question 2: If a showroom sales staff is hourly + commission, and they earn a monthly commission must you take that commission and compute the amount allocable to each week of that month and pay additional overtime, even if you've already paid overtime based on their hourly wage?

Answer 2: Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. Where it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other method must be adapted. Two methods commonly used are allocating equal amounts of the commission to each workweek during the commission period or allocating equal amounts of the commission to each hour worked during the commission period. These methods of allocating commissions are discussed in section 778.120.

Question 3: If we establish a salary for a regular 45 hour workweek and pay overtime according to a salary for a workweek exceeding 40 hours, can you dock for partial days or full days for sick/personal and or vacation?

Answer 3: If an employee is paid a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for practical purposes employed at an hourly rate of pay.

For example:

If an employee is paid a fixed salary of $300 for a fixed workweek of 45 hours, the employee's regular rate of pay is $6.67 ($300/45 hours). During a workweek when the employee works 45 hours, he/she will receive $300 salary plus $16.68 in overtime compensation (1/2 x $6.67 x 5 hours) or a total of $316.68.

During a workweek when the employee works 48 hours, he/she will receive $300 salary plus $16.68 in overtime compensation for the hours between 40 and 45 plus $30.02 for the hours worked between 45 and 48 ($6.67 x 1 1/2 x 3 hours) or a total of $346.70. In a workweek where the employee works only 38 hours, he/she will receive $253.45 (38 hours x $6.67).

Question 4: Can you pay a showroom sales associate on a salary basis and consider him or her exempt from overtime if the associate does not handle outside sales 80% or more of the time?

Answer 4: The criteria for the executive, administrative, professional and outside sales exemption are contained in 29 C.F.R. Part 541 (copy enclosed). There is not enough information in your letter for a determination on the exempt status of a showroom sales associate to be made.

If you have further questions regarding the application of the Fair Labor Standards Act you may find it more convenient to contact the Richmond, Virginia Wage and Hour District Office located at The 700 Center, 700 East Franklin Street, Suite 560, Richmond, Virginia, 23219, telephone: 804-771-2995.

We trust this is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Enclosures

1997 WL 998050 (DOL WAGE-HOUR)

APPENDIX H

1996 WL 1031769

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
March 28, 1996

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This is in response to your letter requesting an opinion concerning the application of section 778.114 of 29 CFR Part 778 to deductions for vacation and sick leave. In this regard, we note that you have enclosed copies of opinions relative to section 778.114 and section 541.118 of 29 CFR Part 541.

You state that your client pays its employees overtime under the fluctuating workweek method as outlined in section 778.114, and you request our opinion regarding three questions concerning these employees. Based on the information provided, our responses to your questions are as follows:

Q.1. Can a partial or full day's absence be charged against an allowable vacation "bank", as long as the employee does not exhaust his allowed vacation days, and thus does not have his pay reduced?

A.1. Yes, partial or full days absences may be charged against an employee's allowable vacation "bank" as long as the employee receives his or her full salary in any workweek when he or she performs any work.

Q.2. Can a partial or full day's absence be charged against an allowable absence "bank", as long as the employee does not exhaust his allowed absences, and thus does not have his pay reduced?

A.2. Same as A.1. above for an allowable absence "bank."

Q.3. If an employee exhausts his allowed absences, can his pay be reduced for subsequent full day absences?

A.3. No. One of the primary requirements of section 778.114 is that the employee receives his or her guaranteed salary in any workweek when he or she performs any work. Under section 778.114, the fact that an employee has exhausted his or her allowed absences would not permit an employer to make deductions from the employee's salary for full day absences.

Furthermore, while the principles set forth in section 541.118 of 29 CFR Part 541 are not applicable with regard to the principles set forth in section 778.114, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his or her full salary in any workweek when he or she performs no work.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

1996 WL 1031769 (DOL WAGE-HOUR)

APPENDIX I

1995 WL 1032466

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
February 27, 1995

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This is in response to your letter requesting an opinion concerning the application of section 778.114 of CFR Part 778 to deductions for vacation and sick leave when employees have worked some in the weeks that they take this time off.

You state that an employer gives each of his employees one day vacation and one day sick pay for each four-week period that the employee works. An employee who is paid on the fluctuating workweek salary basis takes two days off during a workweek for personal reasons. The employer pays the employee his full salary for that workweek, and deducts two days vacation pay from his accrued vacation time. Such deductions occurred several times when the employee took off for personal reasons until he had exhausted all of his vacation time. We note that the employee was paid his full salary during these workweeks.

You further state that the employer closed down all operations for one week for its annual vacation, but did not pay the employee who is paid on a fluctuating workweek basis any vacation pay because he had previously used up his vacation time. The employee does not believe that the fluctuating workweek salary basis was met because of the deductions made.

Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114, one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. Therefore, in your situation the requirements of section 778.114 are met where the employee is paid his/her full salary in any workweek when he/she performs any work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion. While the principles set forth in section 541.118 of 29 CFR Part 541 are not applicable with regard to the principles set forth in section 778.114, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his/her full salary in any workweek when he/she performs no work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect

to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

APPENDIX J

1999 WL 1002390

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
April 20, 1999

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This is in response to your request for an opinion with respect to the following three questions:

Your first question is derived from an opinion letter dated March 28, 1996. You ask why deductions are allowed for exempt salaried employees under §541.118 for an absence of a full day for personal reasons or disability, and are not allowed for salaried non-exempt employees on a fluctuating workweek under § 778.114?

As stated in the March 28, 1996 letter, the principles set forth in s541.118 are not applicable with regard to the principles set forth in §778.114. Section 541.118 refers to the salary requirements for employees who may qualify for exemption from the minimum wage and overtime pay requirements under section 13(a)(1) of the Fair Labor Standards Act (FLSA), and not to the salary requirements under the fluctuating workweek method of compensation. As explained in §778.114, one of the primary requirements is that the employee receives his or her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they are few or many. Therefore, no deductions in the employee's salary for full day absences are allowed. On the other hand, §541.118 allows deductions to be made in the guaranteed salary

of exempt employees for full day absences under certain circumstances. §§541.118(a)(2) and 541.118(a)(3).

In your second question you state that an employer closes the plant on designated holidays and gives full pay for the day to all eligible employees. An employee is eligible to receive full pay only if he or she has been employed for 3 months and works on the workday preceding the holiday. In this situation, exempt employee A has worked for only 2 months before the holiday, and exempt employee B did not work on the day preceding the holiday. You ask "If either of them is denied pay for the unworked holiday, will the salaried status be impaired?" The answer is yes. As stated in §541.118, an employee will be considered to be paid "on a salary basis" if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of the quality or quantity of work performed. Thus, an employee will not be considered to be paid "on a salary basis" if deductions are made from his or her predetermined compensation for unworked holidays. Such deductions are not permitted under the regulations. See §541.118(a)(6).

Your third question relates to an opinion letter dated February 25, 1997, concerning an exempt employee who occasionally works at a second, non-exempt position. It was stated that if the employee devoted more than 20% of his time in a workweek to the extra, non-exempt work, he would lose his exempt status. You ask "Where the employee's salary is $250 per week or more, should not the limit on the amount of non-exempt work be expressed in terms of "primary duty" instead of 20%? The answer is yes. Under the "short" test, an executive employee who is paid at least $250 a week may qualify for exemption if his or her primary duty consists of

management and who regularly directs the work of at least two or more other employees (§541.1(f)). An administrative employee who is paid on a salary basis of at least $250 a week may qualify for exemption if the employee has as his or her primary duty office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which include work requiring the exercise of discretion and independent judgment (§541.2(e)(2)); and a professional employee who is paid at least $250 a week may qualify for exemption if the employee's primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study and the consistent exercise of discretion and judgment (§541.3(e)).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that this information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Enclosure

1999 WL 1002390 (DOL WAGE-HOUR)

APPENDIX K

29 C.F.R. § 778.114 – Fixed Salary For Fluctuating Hours

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked into the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from

week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employees average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are n amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the

prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]